Title: PLEDGES OF COLLATERAL SECURITIES

A TREATISE

ON THE

LAW OF PLEDGES

INCLUDING

COLLATERAL SECURITIES

BY

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To

JOSEPH WILLARD, ESQUIRE

Learned Counselor of the Boston Bar

As a Mark of Esteem

And Token of Friendship for a Harvard Classmate

This Work is Dedicated

By the Author

PREFACE TO THE SECOND EDITION

SINCE the publication of the original edition of this work, numerous and important decisions have been made in the subject of Pledges, and to incorporate these and the statutory changes in the work is the author's purpose in the present edition. Additions to the text and notes of almost every section have been made and new sections to the number of 130 have been added. The present edition contains about 275 pages more than the former; and the new cases cited number about 1300. The section numbers of the original work have been retained in order to facilitate the finding of references to the text made in the reports.

The contract of pledge is a very simple one, and it may be entered into without any formality. Pledge transactions are very numerous, and as compared with mortgage transactions the latter are few. Litigation occurs for the most part only when others besides the principal parties acquire rights in the subject of the pledge; and when such rights enter into the transaction, very difficult and complex questions of law frequently arise. The decisions of such questions have been given with the fullness of statement which the difficulty and importance of the questions seemed to demand. Such questions arise most frequently in Pledges of Negotiable Paper and of Corporate Stocks; and accordingly the chapters relating to these subjects together fill about 80 pages more than they did in the former edition.

In addition to the usual references to the official reports, references have been made to the Reporters of the National Reporter System, and to the American Decisions, American Reports and American State Reports, for cases also found in these reports; thus to recent decisions giving references to two or three reports of the same case.

L. A. J.

BOSTON, *April 1, 1901.*

PREFACE TO THE FIRST EDITION

THE present work is not upon a new subject; but it treats, for the most part, of new phases of an old subject. The general principles of the Law of Pledges, first systematically stated very briefly by Lord Chief Justice Holt, and afterwards restated more fully by Sir William Jones, have in recent times been more elaborately expounded in the treatises of Judge Story and Mr. Schouler: but all these writers have treated the subject only as one topic of the general branch of the law, known as Bailments. Moreover, these principles were formulated with reference to Pledges of tangible personal chattels; and to such transactions they were applied exclusively, until, in recent times, the business of the commercial world came to be conducted largely by the use of paper representatives of credits and values, and paper symbols of property.

During the last half century the Law of Pledges has assumed a new importance from its adaptation to such transactions as loans upon negotiable paper, upon shares and bonds of corporations, upon bills of lading of railroad companies and other common carriers, and upon warehouse receipts. But even so recent a writer as Judge Story found it possible to dismiss in three lines the matter of pledges of corporate stocks.

The present work has been written chiefly with the view of stating and discussing the Law of Pledges in its application to incorporeal personalty. To pledges of such property the term "Collateral Securities" has in recent years been quite gener-

ally applied, both by business men and by lawyers. The giving and taking of such securities by bankers, brokers, and merchants, is now an important element in the business transactions of every day in all the centers of trade and commerce. Accordingly the several topics, of Pledges of Negotiable Paper, of Non-negotiable Choses in Action, of Corporate Stocks, of Bills of Lading, and of Warehouse Receipts, have been treated separately, and with such fullness of statement and illustration as the importance of these topics seems to demand. Thus, two chapters, having together nearly a hundred pages, are devoted to the consideration of Pledges of Negotiable Paper; and three chapters, with about a hundred and fifty pages, are devoted to the consideration of Pledges of Corporate Stocks.

While I have taken much pains to collect the decisions upon the subjects treated of, and have sought for them under numerous titles in the digests and reports, I can not hope to have gathered everything of value. I can only hope that I have not made serious omissions.

L. A. J.

BOSTON, *October 1, 1883.*

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THE LAW OF PLEDGES

INCLUDING

COLLATERAL SECURITIES.

CHAPTER I.

THE NATURE OF A PLEDGE.

I. *The Contract Defined.*

§ 1. **A pledge may be defined** to be a deposit of personal property as security, with an implied power of sale upon default.[1] Lord Holt,[2] who was the first to make a systematic statement of the general law of bailment, defined a pawn to be that sort of bailment "when goods or chattels are delivered to another, to be a security to him for money borrowed of him by the bailor." Sir William Jones[3] defined it to be "a bailment of

[1] An implied power of sale always accompanies a deposit of property in pledge, though there may also be an express power of sale. This implied power of sale is a feature which distinguishes a pledge from a lien; Pothonier v. Dawson, Holt N. P. 383; Doane v. Russell, 3 Gray (Mass.) 382; Jackson v. Kincaid, 4 Okla. 554, 561, 46 Pac. Rep. 587; First Nat. Bank v. Harkness, 42 W. Va. 156, 164, 24 S. E. Rep. 548, quoting text; Thames Iron Works Co. v. Patent Derrick Co., 1 Johns. & H. 93; and though the usual definitions of a pledge do not allude to this characteristic, it seems that no definition is complete which does not include it.

[2] Coggs v. Bernard, 2 Ld. Raym. 909, 913.

[3] Bailments, 118.

goods by a debtor to his creditor, to be kept by him till his debt is discharged." The definition given it by Judge Story[1] is, "a bailment of personal property as a security for some debt or engagement."

In a few states there is a statutory definition of a pledge. Thus, in California,[2] North Dakota,[3] South Dakota[4] and Montana,[5] a pledge is defined to be a deposit of personal property by way of security for the performance of another act. Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge.[6] In Georgia,[7] a pledge or pawn is declared to be property deposited with another as security for the payment of a debt. In Louisiana,[8] a pledge is declared to be a contract by which a debtor gives something to his creditor as a security for his debt.

The term "collateral security" has in recent years come into general use to designate a pledge of negotiable paper, corporate stocks, or other incorporeal personalty, as distinguished from a pledge of corporeal chattels. In a broad sense, "collateral security is one, side by side with, or in addition to, the first, or in addition to the debtor's own obligation;"[9] and in this sense might apply to a mortgage whether of real or personal property, or to a pledge of a chattel, or of a chose in action as well. But the customary use of the term to designate a pledge of incorporeal personal property seems now to be well established; and it is convenient to have a term to distinguish a pledge of such property from an ordinary pledge of chattels, because many rules of law applicable to the one

[1] Bailments, § 286.

[2] Civil Code, § 2986.

[3] R. Codes 1895, §§ 4744, 4745.

[4] Annot. Stats. 1899, § 5595.

[5] 1 Codes 1895; Civ. Code, §§ 3890, 3891.

[6] First Nat. Bank v. Harkness, 42 W. Va. 156, 165, 24 S. E. Rep. 548, quoting text.

[7] Code 1895, § 2956.

[8] R. Civil Code 1870, p. 373, art. 3133.

[9] Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120, 127, per Coulter, J.: "*Collateral security*" is defined by Bouvier as a separate obligation attached to another contract to guaranty its performance. By Webster, as security for the performance of covenants, or the payment of money *besides* the principal security. By Worcester, as security for the fulfillment of a contract, or a pecuniary obligation in addition to the principal security.

pledge are not applicable to the other; and therefore this use of the term is here adopted and adhered to.[1]

The term necessarily implies the transfer to the creditor of an interest in, or lien on property, or an obligation which furnishes a security in addition to the responsibility of the debtor; therefore the execution and delivery by the debtor of additional unsecured evidences of his own indebtedness, does not in any legal sense constitute collateral security.[2]

§ 2. **A pledge is something more than a mere lien** and something less than a mortgage. In an early English case Chief Justice Gibbs said:[3] "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited by way of security, to indemnify a party against a loan of money, it is more than a lien.[4] The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade." Both in a pledge and in a lien the general property remains in the debtor, and the creditor has only a special property. But the nature and extent of this special property in the two cases is quite different. A lien gives only a personal right to retain possession.[5] The

[1] Story on Bailments, § 288, note by Schouler. And see, further, upon the present use of this term, Schouler's Bailments, 159; *In re* Athill, L. R. 16 Ch. D. 223; Railroad Co. v. National Bank, 102 U. S. 14; Collins v. Gilbert, 94 U. S. 753.

[2] *In re* Waddell-Entz Co., 67 Conn. 324, 35 Atl. Rep. 257; Schnitzler v. Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. Rep. 498. The note given as collateral security was signed by the maker of the principal note, and indorsed by three others, and it is difficult to see any good reason why this note should not have been regarded as collateral security. The indorsed note may have had the effect of extending the time of payment of the principal note if the latter matured before the collateral note.

[3] Pothonier v. Dawson, Holt N. P. 383,385. "It may be inferred, therefore, that the contract was this: 'If I (the borrower) repay the money, you must redeliver the goods; but if I fail to repay it, you may use the security I have left to repay yourself.' I think, therefore, the defendant (the lender) had a right to sell." Per Gibbs, C. J.

[4] In the report the word "pledge" is used; but, as suggested by Mellor, J., in Donald v. Suckling, L. R. 1 Q. B. 585, this is obviously a mistake for the word "lien."

[5] M'Combie v. Davies, 7 East 6. Lord Ellenborough there declared that "nothing could be clearer than that liens were personal, and could not be transferred by a tortious pledge."

Mr. Justice Buller, in his celebrated

creditor holding this security can not transfer it to any other person, nor can he himself enforce it by sale of his own motion, without the aid of judicial proceedings.[1] A creditor holding a pledge may, on the other hand, transfer his interest to another, and he may himself enforce his security by sale without the aid of a court. "The right of the pledgee to sell the article pledged upon the non-performance of the pledgor's obligation, is the one characteristic which distinguishes a pledge from a common law lien; and, while the former is always accompanied with an implied power of sale, if none be expressed, it is often declared in the contract of pledge, and the exercise of the power may, of course, be regulated and controlled, and the rights and obligations of the parties with respect to the sale be specifically defined, by the express agreement of the parties."[2]

§ 3. **On the other hand, a pledge is something less than a mortgage**, or, in other words, "a mortgage is a pledge and more; for it is an absolute pledge to become an absolute interest, if not redeemed at a certain time.[3] A pledge is a deposit of personal effects, not to be taken back but on payment of a certain sum, by express stipulation or the course of trade, to be a lien upon them." The legal title to the property passes by the mortgage, and not merely the possession, or the right

judgment in Lickbarrow v. Mason, 6 East 21, note, says that he who has a lien only on goods has no right to sell or dispose of the goods; he can only retain them till the price is paid.

In Donald v. Suckling, L. R. 1 Q. B. 585, Cockburn, C. J., said: "We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien for the purpose of its custody. In the contract of pledge, the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own, if the debt be not paid, and the thing redeemed, at the appointed time." See, also, First Nat. Bank v. Illinois T. & S. Bank, 84 Fed. Rep. 34.

[1] Thames Iron Works Co. v. Patent Derrick Co., 1 Johns. & H. 93; Mulliner v. Florence, 3 Q. B. D. 484.

[2] Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 598, 42 N. E. Rep. 995.

[3] Jones v. Smith, 2 Ves. Jr. 372, per Master of the Rolls; Brown v. Bement, 8 Johns. (N. Y.) 96; Marquam v. Sengfelder, 24 Ore. 2, 32 Pac. Rep. 676.

of possession; while the mortgagor has merely an equitable right to redeem.[1] A pledge, therefore, differs from a mortgage, and from a lien as well. As said by Mr. Justice Willes, in delivering a judgment in the Exchequer Chamber: "There are three kinds of security: the first, a simple lien; the second, a mortgage passing the property out and out; the third, a security intermediate between a lien and a mortgage, viz., a pledge, where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt."[2]

II. *Distinguished from a Chattel Mortgage.*

§ 4. **A pledge differs from a chattel mortgage in three essential characteristics.** 1. It may be constituted without any contract in writing, merely by delivery of the thing pledged.[3] 2. It is constituted by a delivery of the thing pledged, and is continued only so long as the possession remains with the creditor.[4] 3. It does not generally pass the title to the thing pledged, but gives only a lien to the creditor, while the debtor retains the general property.[5] "While the distinction between

[1] Walter v. Smith, 5 B. & Al. 439; Maugham v. Sharpe, 17 C. B. N. S. 443.

[2] Halliday v. Holgate, L. R. 3 Exch. 299.

[3] § 5.

[4] § 22. It is stated by Sir William Jones that "the distinction between pledging, where possession is transferred to the creditor, and hypothecation, where it remains with the debtor, was originally Attic; but scarce any part of the Athenian laws on this subject can be gathered from the ancient orators, except what relates to bottomry, in the five speeches of Demosthenes." Bailments, 84.

[5] §§ 7-17; Jones on Chattel Mortgages, § 4; Hyams v. Bamberger, 10 Utah 3, 36 Pac. Rep. 202; Jones v. Baldwin, 12 Pick. (Mass.) 315; Thompson v. Dolliver, 132 Mass. 103; Parshall v. Eggart, 52 Barb. (N. Y.) 367; Robertson v. Wilcox, 36 Conn. 426, 430; Fletcher v. Howard, 2 Aik. (Vt.) 115, 16 Am. Dec. 686; Conner v. Carpenter, 28 Vt. 237; Union Trust Co. v. Rigdon, 93 Ill. 458; Lobban v. Garnett, 9 Dana (Ky.) 389; Petitt v. First Nat. Bank, 4 Bush (Ky.) 334; Hamilton v. Wagner, 2 Marsh. (Ky.) 332; Sanders v. Davis, 13 B. Mon. (Ky.) 432; Luckett v. Townsend, 3 Tex. 119, 49 Am. Dec. 723; Evans v. Darlington, 5 Blackf. (Ind.) 320; Geilfuss v. Corrigan, 95 Wis. 651, 665, 70 N. W. Rep. 306; McCoy v. Lassiter, 95 N. C. 88. So declared by statute. *Georgia:* Code 1873, § 2142.

In a few exceptional cases it has been declared that the legal title to

these two forms of security is well defined, yet, owing to the haste with which transactions are often made, and to the meagreness or abbreviations of the written papers which accompany them, it is not easy always to determine what character is properly to be attributed to them."[1]

§ 5. **The contract of pledge is in general a contract wholly implied in law.** No written contract is necessary, and generally none is made. If there be a written contract, it is generally made either to show that the transaction is a pledge and not a sale, or to provide a special mode for enforcing the lien.[2] A mortgage under the registry laws must necessarily be made by a written transfer, while a pledge, though it may be constituted by writing, is ordinarily made by a delivery of the property without any writing, the contract of the parties being wholly implied in law.[3] A delivery of property as security for a debt without a written conveyance can not be a mortgage, but must be a pledge.[4]

But in Louisiana the contract of pledge of movable property, other than promissory notes, bills of exchange, stocks, or claims, in order to affect third persons, must be by written act; and the amount of the debt and the nature of the thing pledged must be mentioned in the act.[5] The Code[6] declares that the pawn invests the creditor with the right of causing his debt to be satisfied by privilege and in preference to the other creditors of his debtor, out of the product of the movable, corporeal

property pledged by chattel mortgage remains in the mortgagor until it is divested by foreclosure sale. Randall v. Persons, 42 Neb. 607, 60 N. W. Rep. 898.

[1] Thompson v. Dolliver, 132 Mass. 103, 104, per Devens, J.

[2] Cortelyou v. Lansing, 2 Caines Cas. (N. Y.) 200; West v. Beach, 3 Cow. (N. Y.) 82; Barrow v. Paxton, 5 Johns. (N. Y.) 258, 260, 4 Am. Dec. 354; M'Lean v. Walker, 10 Johns. (N. Y.) 471; Romaine v. Van Allen, 26 N. Y. 309; Wright v. Ross, 36 Cal. 414, 429; Doak v. Bank of the State, 6 Ired. (N. C.) L. 309.

[3] Jones on Chattel Mortgages, § 2; Arendale v. Morgan, 5 Sneed (Tenn.) 703.

[4] Day v. Swift, 48 Me. 368.

[5] De Blois v. Reiss, 32 La. Ann. 586; Matthews v. Rutherford, 7 La. Ann. 225; Martin v. Casey, 15 La. Ann. 165; Freiburg v. Dreyfus, 135 U. S. 478, 10 Sup. Ct. Rep. 716, affirming Weiler v. Dreyfus, 26 Fed. Rep. 824.

[6] R. Civ. Code 1870, §§ 3157, 3158.

or incorporeal, which has been thus burdened. But this privilege shall take place against third persons only in case the pawn is proved by an act made either in a public form or under private signature; provided such act has been recorded in the manner required by law; provided, also, that whatever may be the form of the act, it mentions the amount of the debt, as well as the species and nature of the thing given in pledge, or as a statement annexed thereto of its number, weight and measure.

All pledges of movable property may be made by private writing, accompanied by actual delivery;[1] and the delivery of property on deposit in a warehouse shall pass by the private assignment of the warehouse receipt, so as to authorize the owner to pledge such property; and such pledge so made, without further formalities, shall be valid as well against third persons as against the pledgors thereof, if made in good faith. If a credit not negotiable be given in pledge notice of the same must be given to the debtor.

There must, however, be a contract, either express or implied, to constitute a pledge. The mere retaining of the property of another without his consent does not constitute a pledge of such property as security for a debt of the owner of the property.[2]

But if shares of corporate stock are delivered to a bank by a debtor of the bank, and the parties do not, by any words or instrument, attempt to define the relation which they shall hold to the property so delivered, the transaction can not be regarded as a sale or a payment of the indebtedness, but the deposit of the stock will be presumed to have been intended as collateral security for the debt.[3]

[1] The act of pledge which states the amount of the debt, and the nature of the thing given in pledge, need not, it seems, state that the property was delivered to the pledgee. This fact may be proved by parol evidence, such, for instance, as the testimony of the pledgee. Auge v. Variol, 31 La. Ann. 865. There is no occasion to record a pledge when the property comes into the actual possession of the pledgee before any conflicting lien attaches to it. Helm v. Meyer, 30 La. Ann. 943.

[2] Taylor v. Jones, 3 N. Dak. 235, 55 N. W. Rep. 593.

[3] Borland v. Nevada Bank, 99 Cal. 89, 33 Pac. Rep. 737.

In Alabama it is provided by statute that all corporations, bankers and brokers engaged in making discounts or loaning money, when receiving collateral must, if demanded, give a receipt in writing, describing the collateral and stating the character of the debt, the time of its maturity, and amount. If negotiable bonds are taken as collateral, the receipt must, if such bonds are numbered, state the series number thereof. No title to such collateral shall pass if there be a willful neglect or refusal to give such receipt.[1]

§ 6. **Though a pledge be evidenced by a writing it need not be recorded** if the writing constitute a pledge and not a mortgage.[2] Thus a written instrument given by the purchaser of a stock of drugs to indemnify a surety upon his purchase note, and to secure him for rent of the premises where the stock was kept for sale, provided that a third person as receiver should take and hold possession of the stock, furniture, and fixtures, keep the books, superintend the business, secure the money, and pay, at the end of each week, to the surety, all the moneys received, until his claims should be satisfied; and possession was taken by such receiver accordingly. It was held that the transaction was a pledge, and not a mortgage, and, therefore, required no registration to render the agreement valid against creditors of the pledgor.[3] The transaction was a pledge because the written instrument did not undertake to sell, transfer, or convey the stock in question to the surety, but merely to transfer the possession of it to a third person for his benefit, to be held till the debt should be discharged, the general property remaining all the while in the debtor.

There is nothing in an act requiring the registry of mortgages of personal property from which an inference can be drawn that a pledge must be recorded in order to be valid. In

[1] 1 Code 1896, § 946.

[2] First Nat. Bank v. Harkness, 42 W. Va. 156, 168, 24 S. E. Rep. 548, quoting text.

[3] McCready v. Haslock, 3 Tenn. Ch. 13. And see Rohrbough v. Johnson, 107 Cal. 144, 40 Pac. Rep. 37; Smith v. Mott, 76 Cal. 171, 18 Pac. Rep. 260.

And though in writing, the instrument when a pledge need not bear a mortgage stamp. Harris v. Birch, 9 M. & W. 591.

the absence of direct legislation affecting pledges, these are to be regarded as contracts at common law, requiring no registration to give them effect.[1]

§ 7. **A pledge differs from a mortgage of personal property in being a lien upon property and not a legal title to it**; and the pledgee's special property in the pledge is not enlarged by the pledgor's default in paying the debt secured at its maturity.[2] The legal title to property pledged remains in the pledgor, while a mortgage passes the legal title of the property itself to the mortgagee, subject to be revested in the mortgagor, upon the performance by him of an express condition subsequent.[3]

It is true that Lord Coke has said that the pledgee has a property in the thing pledged;[4] and again that he has a property in it, and not a custody only.[5] But he is understood to mean by this a special property, and not a property in the general sense of the word. Lord Holt said the pawnee has a special property giving him security for the repayment of the debt, and power to compel the pawnor to pay him.[6] Chief

[1] Doak v. Bank of the State, 6 Ired. (N. C.) L. 309; Barrett v. Cole, 4 Jones (N. C.) L. 40; Thoms v. Southard, 2 Dana (Ky.) 475, 479, 26 Am. Dec. 467; Hamilton v. Wagner, 2 Marsh. (Ky.) 332; Sanders v. Davis, 13 B. Mon. (Ky.) 432.

[2] Jones v. Smith, 2 Ves. Jr. 372, 378; Corall v. Rolle, 1 Atk. 167; Cortelyou v. Lansing, 2 Caines (N. Y.) Cas. 200; Winchester v. Ball, 54 Me. 558; Walcott v. Keith, 22 N. H. 196; Whittle v. Skinner, 23 Vt. 531; Ponce v. McElvy, 47 Cal. 154; Wright v. Ross, 36 Cal. 414; Gay v. Moss, 34 Cal. 125; Donnell v. Wyckoff, 49 N. J. L. 48, 7 Atl. Rep. 672.

[3] Jones on Chattel Mortgages, 84; Jones v. Smith, 2 Ves. Jr. 378; Lickbarrow v. Mason, 6 East 22, 25, note; Tedesco v. Oppenheimer, 15 Misc. (N. Y.) 522, 37 N. Y. Supp. 1073; Sheridan v. Presas, 18 Misc. (N. Y.) 180, 41 N. Y. Supp. 451; Brown v. Bement, 8 Johns. (N. Y.) 96; Brownell v. Hawkins, 4 Barb. (N. Y.) 491; Bates v. Wiles, 1 Handy (Ohio) 532; Union Trust Co. v. Rigdon, 93 Ill. 458; Barfield v. Cole, 4 Sneed (Tenn.) 465; Sims v. Canfield, 2 Ala. 555; Petitt v. First Nat. Bank, 4 Bush (Ky.) 334; Eastman v. Avery, 23 Me. 248; Cortelyou v. Lansing, 2 Caines (N. Y.) Cases 200. Kent, C. J., during an argument of Barrow v. Paxton, 5 Johns. 260, 4 Am. Dec. 354, says this case was never decided, and that the opinion, though written by him, was never filed; Hyams v. Bamberger, 10 Utah 3, 15, 36 Pac. Rep. 202; First Nat. Bank v. Harkness, 42 W. Va. 156, 166, 24 S. E. Rep. 548, quoting text; Geilfuss v. Corrigan, 95 Wis. 651, 665, 70 N. W. Rep. 306.

[4] Co. Litt., 89 *a*.

[5] Southcote's Case, 4 Rep. 83 *b*.

[6] Coggs v. Bernard, 2 Ld. Raym. 909, 916, 917.

Justice Fleming in an early case said:[1] "There is difference between a mortgage of land and pledging of goods; for the mortgagee hath an absolute interest in the land, but the other hath but a special property in the goods, to detain them for his security."

Accordingly it was properly held that an employe who was by contract entitled to a certain salary so long as he should continue to own certain stock in the corporation, did not forfeit his right to his salary by pledging his stock.[2]

§ 8. **The form of the transaction is therefore important** in determining its character.[3] Whenever there is a conveyance of the legal title to personal property upon an express condition subsequent, whether contained in the conveyance or in a separate instrument, the transaction is a mortgage.[4] Thus, if a bill of sale of a horse be made, and at the same time a defeasance be given back by the purchaser, engaging that on the payment of the purchase price within a specified time he will redeliver the horse, the transaction is a mortgage and not a pledge of the horse.

An instrument in writing which recites a debt, and declares that the debtor does thereby deliver certain property to his creditor to secure the debt, is a pledge and not a mortgage, because there is no transfer of the title to the property, but only a deposit of it. Although such an instrument contains a covenant to warrant and defend the title, such as is usual in a mortgage, the character of the instrument is not thereby changed.[5] The covenant is not a present conveyance, but an executory stipulation.

A delivery of personal property by a debtor, in security for a debt, accompanied by a written agreement, whereby the debtor agrees that if he does not pay the debt by a certain

[1] Ratcliff v. Davis, Yel. 178, 1 Bulst. 29, Cro. Jac. 244.

[2] McMullan v. Dickinson Co., 63 Minn. 405, 65 N. W. Rep. 661, 663.

[3] Jones on Chattel Mortgages, § 8.

[4] People v. Remington, 59 Hun (N. Y.) 282, 287, 12 N. Y. Supp. 824, 14 N. Y. Supp. 98, quoting text.

[5] Hamilton v. Wagner, 2 Marsh. (Ky.) 331.

time the creditor may dispose of the property to pay the debt, is a pledge and not a mortgage; for the agreement does not show any intention to transfer a title to the property absolutely or conditionally, but only to deliver the property as security, with a right in the creditor to sell it if the debt be not paid by a certain time.[1] A delivery of such property to a creditor upon an oral agreement in like terms is, of course, a pledge.[2] In fact, an ordinary pledge implies an agreement by the parties in effect the same as that which in the cases above referred to the parties expressed in their written or verbal agreements. Whatever may be the form of an express agreement upon which property is delivered as security for a debt, if this be in effect the same that is implied in an ordinary pledge, the transaction is a pledge.

An agreement whereby certain certificates of stock are delivered as collateral security, with a stipulation that if the debt is not paid at maturity the securities shall be under the control of the holder, who is authorized to dispose of them, and apply the proceeds to the credit of the maker, is a pledge of the stocks and not a mortgage; for the instrument contains no words of sale, whereby the title to the stocks passes to the creditor. The title remains in the pledgor, with merely an authority in the pledgee to sell in case of default. The clause giving the creditor control of the property after default gives him no other or further right than any pledgee has to sell the pledge, according to law, to obtain payment.[3]

§ 9. **Though the title must be conveyed to constitute a mortgage, yet the transaction is not necessarily a mortgage because the title is conveyed.** There is a qualification of the general distinction between a mortgage and a pledge that a mortgage is a transfer of title, while a pledge is a mere lien, with respect to choses in action; for in most cases these can not be pledged

[1] Brownell v. Hawkins, 4 Barb. (N. Y.) 491; Houser v. Kemp, 3 Pa. St. 208; Thurber v. Oliver, 26 Fed. Rep. 224, 226, quoting text.

[2] Eastman v. Avery, 23 Me. 248.

[3] Lewis v. Graham, 4 Abb. (N. Y.) Pr. 106; affirmed upon this point in Lewis v. Mott, 36 N. Y. 395, 400, per Davies, C. J.; and see M'Lean v. Walker, 10 Johns. (N. Y.) 471.

without transferring the title.[1] Thus, in a pledge of negotiable paper, the title necessarily passes by a delivery of the paper if this does not require indorsement; or if it does require indorsement, then by delivery after such indorsement. To make the pledge an effectual security, it is necessary that the pledgee should have the legal title. The same is true in general as to other transfers of choses in action, such as transfers of corporate stocks. A transfer of the title to such incorporeal property is generally an essential part of the delivery of it in pledge. An absolute transfer of such property as security for a debt is a pledge and not a mortgage.[2] The general property may be regarded as remaining in the debtor, though the legal title be transferred to the creditor. A transfer of such property by an assignment which is not in form or substance a mortgage will constitute a pledge of it. "Thus, a transfer of stock may be absolute, but still, if its object and character are qualified and explained by a contemporaneous paper which forms a part of the contract, and declares it to be a deposit of the stock as collateral security for the payment of a loan, and there be nothing in the contract to work a forfeiture of the right to redeem, or otherwise defeat it, except by a lawful sale under the power expressly conferred in the agreement, the transaction will be regarded as a pledge. It is also well said that here, as in other cases, the intention of the parties and the real effect of their agreement are to be considered and respected in its enforcement. The purport and substance of the contract determines whether it shall be considered a mortgage or a pledge.[3] It is true that there may be a mortgage of such property; but, to constitute a mortgage of it, the conveyance must be made substantially in the form of a mortgage; that is, it must be a conveyance upon a condition or defeasance expressed in the instrument of conveyance, or by a separate in-

[1] Chapters III and V; Jones on Chattel Mortgages, § 4; Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307; Dewey v. Bowman, 8 Cal. 145, 151; Loughborough v. McNevin, 74 Cal. 250, 14 Pac. Rep. 369, 15 Pac. Rep. 773.

[2] Clymer v. Paterson, 52 N. J. Eq. 188, 27 Atl. Rep. 645. See McDonald v. Birss, 99 Mich. 329, 58 N. W. Rep. 359; Marsh v. Wade, 1 Wash. St. 538, 20. Pac. Rep. 578.

[3] Dungan v. Mut. Benefit Life Ins. Co., 38 Md. 242, 253, per Miller, J.

strument which would be construed as part of the conveyance. Thus, if a policy of insurance be assigned, and the instrument of assignment or a separate defeasance provides that the assignment shall be null and void upon the payment of the debt secured, but otherwise shall continue in full force, the transfer constitutes a mortgage and not a pledge. "The purport and substance of the contract, and the intention of the parties as disclosed by the language they have made use of to express it, clearly indicate a sale or mortgage rather than a pledge.'"[1]

An assignment by one of the beneficiaries of a trust fund held by trustees of his interest under the trust as security for a debt is a pledge rather than a mortgage, although the property held in trust is land which the trustees are to sell and divide the proceeds among the beneficiaries; as the assignment affects only the distributive share of the beneficiary after the execution of the trust.[2]

An assignment of a contract absolute in form, as collateral security, is a pledge rather than a mortgage of it. The fact that the title passes in form does not make the transaction a mortgage. A transfer of title is necessary in order that the creditor may have full control of the contract, and the means of promptly enforcing it.[3]

§ 10. **If property be deposited in the hands of a third person** to secure a creditor, without transferring the title to either the one or the other, the transaction will be a pledge and not a mortgage.[4]

A written contract to secure advances upon wheat by the delivery of warehouse receipts, and to give a lien not only upon the securities then in the creditor's hands, but also upon all such as might be thereafter delivered to him, with a power of sale in case of default, followed by a delivery of such receipts, constitutes a pledge and not a mortgage of the wheat. It is also immaterial in this respect that the receipts contain

[1] Dungan v. Mut. Benefit Life Ins. Co., 38 Md. 242, 253.

[2] Hyman v. Bogue, 135 Ill. 9, 26 N. E. Rep. 40.

[3] Gay v. Moss, 34 Cal. 125.

[4] McCready v. Haslock, 3 Tenn. Ch. 13.

a clause, that in case of a flood—the warehouse being situated on the bank of a river—the property should be at the risk of the owner. "There was no sale of the property or transfer of the title to the plaintiff, but a deposit thereof with a warehouseman as a security for money loaned. The term 'mortgage' is not used in the contract, neither does it contain any language which indicates in the least a sale or transfer of title. The stipulation for a lien, though unnecessary in case of a pledge, is in harmony with the idea of one, of which it is an essential feature; but inconsistent with the idea of a mortgage, which goes further and passes the legal title. The power of sale is also consistent with the purpose to constitute a pledge, of which it is a legal incident, although not an unusual provision in a mortgage. The issue and delivery of the receipt was only a mode of furnishing the plaintiff with the evidence of the deposit of the pledge at the place agreed upon, and the right to the possession of the same, and to dispose of it according to the terms of the bailment. But from the nature of things it was a pledge, qualified by the situation and subject of the contract, and the conduct of the parties under it; so that the custody of the property, instead of being actually or absolutely in the creditor, remained in the warehouseman, subject to his control for the purposes of the contract, and while there at the risk of the 'owners' in case of flood.'"[1]

§ 10a. **An assignment of securities to a trustee with power to sell at his discretion and to discharge an obligation due from the assignor to a third person creates a trust** and not a pledge. The assignor is not in such case entitled to notice of a sale of the securities by the trustee. "In a case of strict and simple pledge the law applicable to pledges must govern the rights of the parties to it, but to apply these rules to the transfer made by the assignor to the trustee would be to disregard the plain terms of the written contract, and fritter away the rights of the parties in a too close adhesion to rules established by the

[1] Bank of British Columbia v. Marshall, 11 Fed. Rep. 19, 27, per Deady, J.

courts to govern the transaction known as a mere pledge or pawn, in which the subject of the pledge is delivered to the pledgee as a security, and to be redelivered when it has served its purpose.'"[1]

§ 11. **An instrument which in terms pledges property** creates only a lien upon it, and is a pledge, whereas one which in terms conveys it absolutely as a security is in legal effect a mortgage.[2] Yet the use of the word "pledge" does not of itself conclusively determine the character of the transaction; for even when the word "pledge" is used, if it is clear that the intent of the parties was that the possession of the goods should remain in the debtor, and the possession does so remain, the transaction will be regarded as a mortgage, and not a pledge.[3] "But where the word 'pledge' is used, and the nature of the transaction is in conformity with the character of a pledge, in this material respect, that the possession is to be in the creditor, the word is accurately used, and must control, both as expressive of the intent of the parties, and of the legal effect of their agreement.'"[4]

§ 12. **The use of the term mortgage** in an instrument whereby security is given does not necessarily make the transaction a mortgage.[5]

An instrument whereby a debtor acknowledges his indebtedness in a certain sum, "and in guaranty of said sum, and all interest that may accrue thereon, I hereby give this guaranty mortgage on the British barque Trait d'Union, her apparel, ballast, chains, and all goods, furniture, and appurtenances appertaining to said vessel, all being my property as per register," possession being delivered to the creditor, is not a mortgage

[1] Murdock v. Columbus Ins. Co., 59 Miss. 152, 160, per Campbell, J.

[2] Jones on Chattel Mortgages, § 11; Prescott v. Prescott, 41 Vt. 131.

[3] Langdon v. Buel, 9 Wend. (N. Y.) 80; Haskins v. Patterson, Edm. Sel. Cas. 120; and see Bonsey v. Amee, 8 Pick. (Mass.) 236.

[4] Haskins v. Patterson, Edm. Sel. Cas. 120.

[5] Jones on Chattel Mortgages, § 12; Thoms v. Southard, 2 Dana (Ky.), 475, 26 Am. Dec. 467.

but a pledge.[1] In such case the vessel goes towards the discharge of the debt, and the pledgee's possession is consistent with the legal title of the owner, and his right to regain possession upon satisfying the debt. Expenses incurred by the pledgee, for repairs upon the vessel while in his charge, are to be deducted from the receipts for her earnings.

If a mortgagee under a mortgage void as against creditors takes possession of the mortgaged property, under an agreement with the debtor that he shall hold possession until the debt is paid, his title will be good as against subsequent attachments and executions by other creditors, by virtue of the contract of pledge, and of the possession under it, though his mortgage be defective because it is not recorded.[2]

If property not in existence or not owned by the mortgagor be mortgaged, the mortgage is invalid at law as against third persons, who may acquire an interest in it, or a lien upon it, before possession be delivered by the mortgagor to the mortgagee. The mortgage is simply an executory contract binding upon the parties, but void as to third persons who have no notice of it. But if the mortgagee, before a third person has obtained any specific interest in it, takes possession of the after-acquired property, he holds the property by way of pledge, but in the same manner as though the mortgage had been executed at the time he takes possession, and in the same manner as though he had taken the property under and by virtue of a chattel mortgage covering the property.[3]

A pledge of goods by a mortgagor to the mortgagee, when the mortgage is fraudulent against the creditors of the former, because the mortgage was of a stock of goods which the mortgagor was allowed to sell in the usual course of business, is effectual, and protects the pledgee against a subsequent attachment by a creditor of the pledgor, although the pledgee leaves

[1] Wilson v. Knapp, 70 N. Y. 596.

[2] Scarry v. Bennett, 2 Ind. App. 167, 28 N. E. Rep. 231; Falk v. Decou, 8 Kan. App. 765; Finn v. Donahoe, 83 Mich. 165, 47 N. W. Rep. 125; Commercial Bank v. Davy, 81 Hun 200, 62 N. Y. St. Rep. 681; Greeley v. Reading, 74 Mo. 309; Nash v. Norment, 5 Mo. App. 545; Jones on Chattel Mortgages, §§ 167, 178.

[3] Cameron v. Marvin, 26 Kan. 612, 629.

the pledgor in possession under an agreement that the latter shall sell the goods and pay the proceeds to the former.[1]

§ 13. **Contracts substantially the same in terms may be construed either as mortgages or pledges under different circumstances,** according as the one security or the other will best effectuate the intentions of the parties, and subserve the purposes of justice.[2] If it appear that the parties intended that their contract should have the legal effect of a mortgage, the fact that they used words denoting a pledge will not necessarily make it a pledge.[3] Thus, an instrument using the words, "I pledge and give a lien," may be construed to be a mortgage;[4] and a writing in the following words, "Turned out and delivered to A. one white-and-red cow, which he may dispose of in fourteen days to satisfy an execution," was held to be a mortgage with a power of sale; chiefly for the reason that the cow was left in the possession of the debtor, and effect could be given to the instrument only by regarding it a mortgage.[5] An instrument which would be a pledge if possession of the property be given to the creditor may be a mortgage if possession be retained by the debtor.[6] Thus, where a conveyance of chattels was made upon condition that it should be void if the grantor should hold the grantee harmless from certain indorsements made by him, the fact that there was no delivery of the property was held to be decisive that the transaction was a mortgage and not a pledge.[7]

[1] Pettee v. Dustin, 58 N. H. 309; Janvrin v. Fogg, 49 N. H. 340, 351. In New Hampshire a mortgage of a stock of goods which the mortgagor may sell in the usual course of trade is invalid, unless it provides that the proceeds of all sales shall be paid to the mortgagee, and they are actually so paid. But this rule does not apply to pledges.

[2] Ward v. Sumner, 5 Pick. (Mass.) 59; Wright v. Bircher, 5 Mo. App. 322, per Bakewell, J. See Jones on Chattel Mortgages, § 14.

[3] Christian v. Atlantic & N. C. R. Co., 133 U. S. 233, 242, 10 S. C. Rep. 260.

[4] Langdon v. Buel, 9 Wend. (N. Y.) 80.

[5] Atwater v. Mower, 10 Vt. 75. See also, Coty v. Barnes, 20 Vt. 78, for a similar case.

[6] Conner v. Carpenter, 28 Vt. 237; and see Gleason v. Drew, 9 Me. 79, a questionable decision; D'Wolf v. Harris, 4 Mason 515.

[7] Ward v. Sumner, 5 Pick. (Mass.) 59.

§ 14. **The law favors the conclusion that a transaction is a pledge** when there is doubt whether it is a pledge or a mortgage. "Whether a transaction amounts technically to a mortgage or a pledge is sometimes a nice question; but the ultimate object of the inquiry is not so much to name the transaction, as to ascertain what was the intention and understanding of the parties to it; and, therefore, such intent, when ascertained, ought to control. In the case of a pure pledge the creditor takes the possession, actual or constructive, of the goods; while in that of a mortgage there is a transfer of the title to him, but not the possession. In all cases, then, where personal property is given as a security for a debt or engagement, accompanied by a change of possession, either actual or constructive, the transaction better comports with the character of a pledge than a mortgage; and where the transaction imports nothing more than giving a security without a sale or change of title of the property, the law favors the conclusion that it was intended as a pledge and not a mortgage. But the rights and obligations of the parties to a pledge may be modified indefinitely by special contract between them, as that the pledge shall be kept, until the default of the pledgor, at some particular place or by some particular person."[1]

§ 15. **A bill of sale absolute in terms, or a receipted bill of parcels** intended only as collateral security, is a pledge if accompanied by a delivery of the property to the creditor.[2] A bill of sale is a mere bill of parcels, subject to explanation by parol evidence.[3] A bill of parcels, tending upon its face to

[1] Bank of British Columbia v. Marshall, 11 Fed. Rep. 19, per Deady, J.

[2] Burlingame v. Goodspeed, 153 Mass. 24, 26 N. E. Rep. 232; Thompson v. Dolliver, 132 Mass. 103; Shaw v. Silloway, 145 Mass. 503, 14 N. E. Rep. 783; Butler v. Rockwell, 14 Colo. 125, 135, 23 Pac. Rep. 462, quoting text; Morgan v. Dod, 3 Colo. 551; Walker v. Staples, 5 Allen (Mass.) 34; Whitaker v. Sumner, 20 Pick. (Mass.) 399, 19 Am. Dec. 29; Hazard v. Loring, 10 Cush. (Mass.) 267; Kimball v. Hildreth, 8 Allen (Mass.) 167; *Ex parte* Fitz, 2 Lowell 519; Bright v. Wagle, 3 Dana (Ky.) 252, 257; Myers v. Moulton, 71 Cal. 498, 12 Pac. Rep. 505.

See Jones on Chattel Mortgages, § 14.

[3] Walker v. Staples, 5 Allen (Mass.) 34; Newton v. Fay, 10 Allen (Mass.) 505.

show an absolute sale, may be shown by parol evidence to have been executed by way of security merely, and, therefore, to be a pledge.[1]

Although a delivery of goods be accompanied by an absolute bill of sale the transaction will, in equity, be regarded as a pledge merely, where it is shown that it was intended as a security for a debt or indemnity for a liability; and it is immaterial that the bill of sale provides that the pledge shall be irredeemable.[2]

But there are cases where the courts have regarded such an absolute transfer as a mortgage and not a pledge. Thus, in Vermont it has been held that if chattels be delivered by a debtor to his creditor as security for a debt, accompanied by a bill of sale, the transaction is a mortgage; for although the bill of sale contain no defeasance and be not accompanied by a separate defeasance, the law gives effect to the intention of the parties, and a verbal defeasance may be proved or implied. The title to the property is transferred to the creditor, subject to be defeated by payment of the debt secured.[3]

If a purchaser of goods gives as security to one who loaned him the purchase money, a bill of sale made by the seller to the purchaser, the lender supposing it to be a mortgage, the transaction amounts to no more than an agreement for a pledge or mortgage.[4]

§ 16. **A receipted bill of parcels of chattels, which on its face purports to be a security** for a debt, is a pledge and not a mortgage.[5] "A bill of parcels given as collateral security only, under which the articles transferred are at once delivered, has all the characteristics of a pledge. The only property intended to be passed is the special property which the pledgee derives from possession. The form here used was not that of

[1] Jones v. Rahilly, 16 Minn. 320; Shaw v. Wilshire, 65 Me. 485; Eastman v. Avery, 23 Me. 248.

[2] Skenandoa Cotton Co. v. Lefferts, 36 N. Y. St. Rep. 63; Morgan v. Dod, 3 Colo. 551.

[3] Blodgett v. Blodgett, 48 Vt. 32.

[4] Copeland v. Barnes, 147 Mass. 388, 18 N. E. Rep. 65.

[5] Thompson v. Dolliver, 132 Mass. 103; and see Shaw v. Wilshire, 65 Me. 485.

a mortgage; there was no defeasance or agreement to reconvey connected with or forming a part of it.'"[1]

§ 17. **An assignment of securities by a debtor to his creditor is presumed to be as collateral security** and not in payment of the debt, in the absence of evidence tending to show an intention that the securities should be applied in satisfaction of the debt, in whole or in part.[2] If the debtor does not show that the assignment was so made in satisfaction of the debt, the law makes a positive inference that the assignment was only as collateral security.[3] That the assignment is absolute in form is of no consequence as regards the question of intention.[4]

§ 18. **A bill of sale conditional in form is a mortgage and not a pledge.**[5] An absolute bill of sale with a separate defeasance is in like manner a mortgage.[6] In like manner a bill of sale, which in express terms secures a debt and authorizes the creditor to sell the property after a given time to pay the debt, if this be not paid before that time, is in legal effect a mortgage.[7]

A written assignment of stocks and bonds to a trustee, who is empowered to sell at discretion, and required to dispose of enough to discharge a note due a third person if the interest thereon is not paid at a specified date, does not constitute a pledge, and the assignor is not entitled to demand or notice before sale. It is manifest that the parties to such agreement intended to place the control of the securities in the trustee, and to arm him with the fullest power to dispose of them.

[1] Thompson v. Dolliver, 132 Mass. 103, per Devens, J.

[2] Butler v. Rockwell, 14 Colo. 125, 135, 23 Pac. Rep. 462, quoting text.

[3] Leas v. James, 10 S. & R. (Pa.) 307, 315; Perit v. Pittfield, 5. Rawle (Pa.) 166, 171; Jones v. Johnson, 3 W. & S. (Pa.) 276, 278, 38 Am. Dec. 760; Eby v. Hoops, 1 Pennypacker (Pa.) 175.

[4] Eby v. Hoopes, 2 Pennypacker (Pa.) 175; Butler v. Rockwell, 14 Colo. 125, 23 Pac. Rep. 462.

[5] Wood v. Dudley, 8 Vt. 430; Homes v. Crane, 2 Pick. (Mass.) 607; Barrow v. Paxton, 5 Johns. (N. Y.) 258, 4 Am. Dec. 354.

[6] Brown v. Dement, 8 Johns. (N. Y.) 96; Clark v. Henry, 2 Cow. (N. Y.) 324.

[7] Barfield v. Cole, 4 Sneed (Tenn.) 465.

The interest transferred to the trustee is not a mere pledge, but something more. The title is vested in the trustee with a power to sell and pay certain debts, and with a requirement to sell and pay in a certain contingency. Such a contract is to be construed according to its terms and the circumstances attending it.[1] Whether the contract be a mortgage or not, it is certainly more than a pledge, under which the pledgor would be entitled to notice to redeem, and notice of the time and place of sale.

An assignment by a debtor to his creditor of a note secured by a mortgage, with condition that upon default in payment of the principal debt the creditor should have authority to collect the collateral note, or to negotiate it for the purpose of liquidating the principal debt, vests the creditor with the legal title to the collateral note, and the transaction is a mortgage rather than a pledge; although both the debtor's assignment and the creditor's receipt refer to the note and mortgage as collateral security.[2]

A contract to secure the purchase money of a herd of cattle, whereby the vendor appoints an agent to accompany the cattle and retain possession of them, with power to enforce the security by sale, is in the nature of a mortgage rather than a pledge, because the lien, as between the parties, is not made to depend altogether upon possession, but upon a contract which defines the rights of the parties, and provides for its enforcement.[3]

[1] Murdock v. Columbus Ins. Co., 59 Miss. 152. For cases bearing a strong resemblance to this, see Milliken v. Dehon, 27 N. Y. 364, which, if a pledge in a legal sense, was declared to be a peculiar contract including more than a pledge, and conferring rights according to the language used.

[2] Fraker v. Reeve, 36 Wis. 85.

[3] Gregory v. Morris, 96 U. S. 619, per Waite, C. J.; Powder Company v. Burkhardt, 97 U. S. 110; Hauselt v. Harrison, 105 U. S. 401. In the latter case Mr. Justice Matthews said: "Such a lien is good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; and if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely."

§ 19. **An absolute bill of sale, and delivery of property with an agreement that the original owner shall have the property back again** after a fixed day, upon repaying the price, with an additional sum for trouble in trying to sell the property, amounts to a pledge,[1] which is lost by giving possession to the general owner.[2]

A bill of sale of goods to the cashier of a bank, stating that the goods are to be held as collateral security for a note of the vendor, and that they are stored in the warehouse of a third party, not accompanied by delivery, is a mortgage and not a pledge.[3]

A contract by a tenant with his landlord, whereby he agreed to cut the hay on the premises, and to put it into the barn where it should remain the property of the landlord, unless the tenant should, before a specified date, pay a certain sum for the hay less than its value, when it should become his property, was properly held to be a pledge.[4]

In like manner a lease of real estate, assigned as security for a debt, is a pledge rather than a mortgage. The creditor has the right to collect the rents, and apply them on the debt. The creditor's title to the lease would not become absolute in law upon the debtor's default in payment of the debt; but the creditor has merely a lien upon the rents, the ownership of the lease remaining with the debtor.[5]

In an action to redeem corporate stock alleged to be held by the defendants as collateral security it appeared that the defendants indorsed the plaintiff's note given to raise money to pay an assessment on the stock, which note the defendants were afterward compelled to pay. At the time of such indorsement plaintiff executed an agreement by which she sold said stock to defendants, the agreement reciting the indorsement

[1] Halle v. Nat. Park Bank, 140 Ill. 413, 29 N. E. Rep. 727.

[2] Kimball v. Hildreth, 8 Allen (Mass.) 167.

[3] People v. Remington, 59 Hun 282, 36 N. Y. St. Rep. 282. And see 12 N. Y. Supp. 824, 14 N. Y. Supp. 98, Thompson v. Blanchard, 4 N. Y. 303; Brown v. Bement, 8 Johns. (N. Y.) 96; Wooster v. Sherwood, 25 N. Y. 278.

[4] Taggart v. Packard, 39 Vt. 628.

[5] Dewey v. Bowman, 8 Cal. 145 *Contra:* Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. Rep. 130.

of the note and providing that if she did not pay the note at maturity, and defendants did so, they should own the stock absolutely. There was no proof of deception or mistake except evidence of a previous conversation between plaintiff's agent and one of the defendants that they would receive the stock as collateral security, and it appeared that the agreement was read to plaintiff before she signed it. It was held that plaintiff was bound by the contract, and that it constituted a sale and not a pledge of the stock.[1]

§ 20. **Whether a particular transaction be a pledge or a sale and agreement to purchase,** upon contradictory evidence respecting the terms of the agreement, is a question for the jury, and the court will not disturb their verdict when this is justified by the evidence. Thus, where the transaction was the sale of a watch for eighty-two dollars, with an agreement that the seller should have it back again upon the payment of eighty-seven dollars, upon evidence tending to show that the watch was really a pledge for a loan, the jury were entitled to find that it was a pledge and not a sale.[2]

If goods are delivered by one person to another under a contract which provides for the retention of the legal title by the party delivering the goods until notes given for the goods are paid and there is no provision for the return of the goods upon such payment, the transaction will be regarded as a conditional sale.[3]

In determining whether a transaction in the form of a sale is a pledge or a sale, either absolute or conditional, inadequacy of price is a circumstance which indicates that it was only a pledge.[4]

A statement that certain property is to be held as guaranty for the payment of a debt may constitute a pledge if the creditor is put in possession of the property. The owner of a

[1] Morganstern v. Davis, 37 N. Y. St. Rep. 819, 14 N. Y. Supp. 31.

[2] Hines v. Strong, 46 How. (N. Y.) Pr. 97.

[3] Morgan-Gardner Electric Co. v. Brown, 193 Pa. St. 351, 44 Atl. Rep. 459. See Keystone Watch Case Co. v. Fourth St. Nat. Bank, 194 Pa. St. 535, 45 Atl. Rep. 328.

[4] Bright v. Wagle, 3 Dana (Ky.) 252.

wood lot executed a lease of it for the term of two years, giving the lessee the privilege of cutting and removing the wood and timber during that time, the lessee giving his promissory note for the same. The lease contained an agreement that the wood and timber on the described premises should be held by the lessor as guaranty for the payment of the note. When the note became due it was not paid and the parties agreed that it might lie on interest. The lessor afterwards permitted the lessee to cut and remove some of the wood and timber. It was held, that the transaction was not a conditional sale but was in the nature of a pledge.[1]

§ 21. **The construction of a transaction evidenced by a writing is a matter of law for the court.** A writing reciting a loan for which the borrower has placed in the lender's hands certain property, and providing that if the loan should not be repaid by a certain time the property should be the lender's absolutely, and that the borrower would give a bill of sale on demand, is not a conditional sale but a pledge or mortgage; for the writing shows that the consideration was a loan of money, and that the property was delivered as collateral security.[2] And so a writing whereby a borrower transfers, as collateral security for the payment of the loan, the note of a third person for double the amount of the sum borrowed, with a provision that in case of default in payment the lender "is to hold the note as his own property," the transaction is a pledge or mortgage and not a conditional sale.[3]

That an absolute transfer of a chose in action as collateral security is a pledge, and not a mortgage, is a conclusion of law.[4]

§ 22. **There may be a statutory pledge** in the same way that there may be a statutory mortgage. Thus a statute which provides that a railroad company, which is to receive bonds of a city

[1] Wilkie v. Day, 141 Mass. 68, 6 N. E. Rep. 542.

[2] Hart v. Burton, 7 J. J. Marsh. (Ky.) 322.

[3] Williamson v. Culpepper, 16 Ala. 211, 1 Am. Dec. 175.

[4] Gay v. Moss, 34 Cal. 125.

to aid its construction, shall issue to the city certificates of stock of the company, for an amount equal to the amount of the bonds received, and that the stock should remain forever pledged for the redemption of the bonds, creates a pledge of the stock to the city.[1] The holders of the bonds issued have primarily nothing to do with the stock. They are to look to the obligation of the city upon the bonds; and if they have any claim to the security held by the city, they are certainly not obliged to have recourse to that in the first instance. They are not compelled to look to the security even if the city holds it for their benefit.

III. *Delivery is Essential to Create a Pledge.*

§ 23. **To constitute a pledge the pledgee must take possession;** and to preserve it he must retain possession.[2] An actual or symbolical delivery of property capable of personal possession is essential. The delivery must be such as would be requisite to transfer the property in the same chattels in case of a sale of them.[3]

[1] United States v. New Orleans, 98 U. S. 381; Forstall v. Consolidated Asso., 34 La. Ann. 770; Citizens' Bank v. Cotton Press Co., 7 La. Ann. 286; Citizens' Bank v. Gay, 47 La. Ann. 551, 17 So. Rep. 148.

[2] Thurber v. Oliver, 26 Fed. Rep. 224, 227, quoting text; Myerstein v. Barber, L. R. 2 C. P. 38; Hilton v. Tucker, 39 Ch. D. 669, 673.

[3] Casey v. Cavaroc, 96 U. S. 467, 490; Casey v. National Park Bank, 96 U. S. 492; Thurber v. Oliver, 26 Fed. Rep. 224; Adams v. Merchants' Nat. Bank, 2 Fed. Rep. 174. *California:* Dodge v. Meyer, 61 Cal. 405, 429; George v. Pierce, 123 Cal. 172, 55 Pac. Rep. 775; Lilienthal v. Ballou, 125 Cal. 183, 57 Pac. Rep. 897; Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500; Engles v. Marshall, 19 Cal. 320; Cahoon v. Marshall, 25 Cal. 201; Godchaux v. Mulford, 26 Cal. 316, 323, 85 Am. Dec. 178; Woods v. Bugbey, 29 Cal. 466; Hesthal v. Miles, 53 Cal. 625; Bell v. McClellan, 67 Cal. 283, 7 Pac. Rep. 699; Kelly v. Murphy, 70 Cal. 560, 12 Pac. Rep. 767; Bunting v. Saltz, 84 Cal. 168, 172, 24 Pac. Rep. 167; Etchepare v. Aguirre, 91 Cal. 288, 295, 27 Pac. Rep. 668, 25 Am. St. Rep. 180; Murphy v. Mulgrew, 102 Cal. 547, 36 Pac. Rep. 857, 41 Am. St. Rep. 200; Rothschild v. Swope, 116 Cal. 670, 48 Pac. Rep. 911; Levy v. Scott, 115 Cal. 39, 46 Pac. Rep. 892; Dubois v. Spinks, 114 Cal. 289, 46 Pac. Rep. 95. *Connecticut:* Huntington v. Sherman, 60 Conn. 463, 22 Atl. Rep. 769. *Georgia:* First Nat. Bank v. Nelson, 38 Ga. 391, 95 Am. Dec. 400. *Illinois:* Silverman v. McGrath, 10 Bradw. 413; Corbett v. Underwood, 83 Ill. 324, 25 Am. Rep. 392; Cooper v. Ray, 47 Ill. 53; Keiser v. Topping, 72 Ill. 226; Atkinson v. Foster, 134 Ill. 472, 25 N. E. Rep. 528. *Iowa:* Nevan v. Roup, 8 Iowa 207. *Kansas:* Raper v. Harrison, 37 Kan. 243, 15

What constitutes a sufficient delivery and possession is often a matter of considerable nicety.[1] In many cases this is a matter of law for the determination of the court.[2]

The modern civil law is also very careful in denouncing the danger of losing the right of pledge, by parting with anything like permanent or continued possession to the pledgor.[3] The Louisiana Code,[4] adopting an article of the Code Napoleon,[5] in regard to the possession of the pledge, provides: "In no case does this privilege subsist on the pledge except when the thing pledged, if it be a corporeal movable, or the evidence of the credit, if it be a note or other instrument under private signature, has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties." And the Louisiana Code further declares:[6] "It is essential to the contract of pledge that the creditor be put in possession of

Pac. Rep. 219. *Louisiana:* Lee v. Bradlee, 8 Martin 20; Citizens' Bank v. Janin, 46 La. Ann. 995; Propst v. Roseman, 4 Jones (N. C.) 130; Britton v. Harvey, 47 La. Ann. 259, 16 So. Rep. 747; Hiligsberg's Succession, 1 La. Ann. 340; Foltier v. Schroder, 19 La. Ann. 17, 92 Am. Dec. 521. *Maine:* Collins v. Buck, 63 Me. 459; Beeman v. Lawton, 37 Me. 544; Day v. Swift, 48 Me. 368; Gleason v. Drew, 9 Me. 79. *Maryland:* Textor v. Orr, 86 Md. 392, 397, 38 Atl. Rep. 939. *Massachusetts:* Moors v. Reading, 167 Mass. 322, 45 N. E. Rep. 760; Kimball v. Hildreth, 8 Allen 167; Walker v. Staples, 5 Allen 34; Homes v. Crane, 2 Pick. 607; Bonsey v. Amee, 8 Pick. 236. *Minnesota:* Combs v. Tuchelt, 24 Minn. 423; Mahoney v. Hale, 66 Minn. 463, 69 N. W. Rep. 334. *Montana:* Codes 1895, Civ. Code, § 3892. *New Hampshire:* Walcott v. Keith, 22 N. H. 196; Colby v. Cressy, 5 N. H. 237, 239; Pinkerton v. Manchester R. Co., 42 N. H. 424, 428. *New York:* Ceas v. Bramley, 18 Hun 187; Barrow v. Paxton, 5 Johns. (N.Y.) 258; Langdon v. Buel, 9 Wend. 80; Parshall v. Eggart, 52 Barb. 367; Brownell v. Hawkins, 4 Barb. 491; Clark v. Costello, 79 Hun 588, 61 N. Y. St. Rep. 556. *North Carolina:* Owens v. Kinsey, 7 Jones (Law) 245; Doak v. State Bank, 6 Ired. 309; Smith v. Sasser, 4 Jones 43; Thompson v. Andrews, 8 Jones 453. *Oklahoma:* Jackson v. Kincaid, 4 Okl. 554, 46 Pac. Rep. 587. *Oregon:* Marquam v. Sengfelder, 34 Ore. 2, 32 Pac. Rep. 676. *Pennsylvania:* Collins' Appeal, 107 Pa. St. 590. *Tennessee:* Crisp v. Miller, 5 Heisk. 697; Johnson v. Smith, 11 Humph. 396. *West Virginia:* Williams v. Gillespie, 30 W. Va. 586, 5 S. E. Rep. 210. *Wisconsin:* Seymour v. Colburn, 43 Wis. 67; Geilfuss v. Corrigan, 95 Wis. 651, 670, 70 N.W. Rep. 306.

[1] Martin v. Reid, 11 C. B. N. S. 730; Donald v. Suckling, L. R. 1 Q. B. 585, 587.

[2] Story Bailm., 297.

[3] Per Bradley, J., in Casey v. Cavaroc, 96 U. S. 467.

[4] R. Civ. Code 1870, art. 3162.

[5] Art. 2076.

[6] R. Civ. Code 1870, arts. 3152, 3153.

the thing given to him in pledge, and consequently that actual delivery of it be made to him, unless he has possession of it already by some other right. But this delivery is only necessary with respect to corporeal things; as to incorporeal rights, such as credits, which are given in pledge, the delivery is merely fictitious and symbolical."

The Code of Georgia[1] declares that delivery of the property is essential to this bailment.

The Codes of California,[2] North Dakota,[3] South Dakota[4] and Montana[5] declare that the lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge-holder.

§ 24. **The requirement of delivery constitutes another practical distinction between a mortgage and a pledge** of personal property; for while a delivery must always accompany a pledge, a mortgage of goods is often good without a delivery.[6]

No formal delivery is necessary. It is sufficient if the property is present so that the pledgee can take possession of it, and he does take possession, and either retains it himself or leaves it in the control of a third person.[7]

§ 25. **Property already in the hands of a pledgee** as collateral security may be pledged for a further loan without any further delivery of it.[8] Thus, the customer of a bank being asked for security on his application to have the proceeds of a draft on a distant place placed to his credit, he replied: "The bank holds all my stocks, and they are security for all my discount and this draft." Upon this he was credited with the proceeds of the

[1] Code 1895, § 2956.

[2] Civil Code, § 2988; Lilienthal v. Ballou, 125 Cal. 183, 57 Pac. Rep. 897; George v. Pierce, 123 Cal. 172, 55 Pac. Rep. 775, 56 Pac. Rep. 53.

[3] R. Codes 1895, § 4746.

[4] Annot. Stats. 1899, § 5597.

[5] 1 Codes 1895, Civ. Code, § 3892.

[6] Barrow v. Paxton, 5 Johns. (N. Y.) 258, 4 Am. Dec. 354; Haskins v. Patterson, Edm. Sel. Cas. 120; Haven v. Low, 2 N. H. 13, 9 Am. Dec. 25; Ash v. Savage, 5 N. H. 545.

[7] Tibbetts v. Flanders, 18 N. H. 284.

[8] Dearborn v. Union Nat. Bank of Brunswick, 61 Me. 369; Van Blarcom v. Broadway Bank, 9 Bosw. (N. Y.) 532; affirmed 37 N. Y. 540; Brown v. Warren, 43 N. H. 430; Herber v. Thompson, 47 La. Ann. 800, 17 So. Rep. 318; Clark v. Costello, 79 Hun (N. Y.) 588, 61 N. Y. St. Rep. 556.

draft, and it was held that the stocks referred to were a pledge for the draft as well as for the discounts previously made on this security.[1]

A pledge of a life insurance policy as security for a definite sum of money may be enlarged by agreement of the parties to secure other obligations of the pledgor to the pledgee, and the agreement may be either written or oral.[2]

Where a pledge is in the hands of the pledgee, and the pledgor and pledgee make alterations in the terms of the pledge, the pledgee having no notice of the intervention of any other rights does not lose his lien upon the pledge.[3]

§ 26. **A pledge of a part of a quantity of goods** is not complete until such part is separated and set apart. Thus, a pledge of thirty cords of bark in a pile containing much more than that quantity is ineffectual until the particular thirty cords have been measured and set apart;[4] unless, perhaps, the part of the pile to be held in pledge be designated by agreement of the parties, so that the pledgee could take the number of cords pledged without any further act on the part of the pledgor.

An iron company in order to secure a warehouse company for advance of money, gave to it, from time to time, written instruments stipulating that the warehouse company should have a first lien on certain specified quantities of iron. All the iron manufactured by the iron company was stored in yards leased by the warehouse company, and kept in its possession.

[1] Van Blarcom v. Broadway Bank, 9 Bosw. (N. Y.) 532, per Barbour, J. "Very little is necessary to constitute a pledge. It is only essential that the property be, or be placed by the owner, in the hands of the creditor or trustee, with an intention on the part of both parties that it should be retained as security for a certain debt or claim. In this case the stocks were already held by the bank. Suppose they had not been, but that, when the debtor said, 'The bank holds all my stocks, and they are security for all my discounts and this draft,' he had at the same time handed the stocks to the bank, would that have made the case any stronger?"

[2] Peck v. Goff, 18 R. I. 94, 25 Atl. Rep. 690.

[3] Mercantile Trust Co. v. Atlantic Trust Co., 69 Hun (N. Y.) 264, 53 N. Y. St. Rep. 374.

[4] Collins v. Buck, 63 Me. 459; Sholes v. Asphalt Co., 183 Pa. St. 528 (*In re* Johnson, 38 Atl. Rep. 1029).

All sales made by the iron company were filled by taking iron from these yards, but, if the amount on hand ever fell below the amount stated as security for the loans, it was at once made good, and an amount greater than that so held as security was usually kept on hand. It was held, that though no specific iron was set apart to the warehouse company, as it was in possession of the whole, the transaction constituted a valid pledge of the amounts of iron stated as security for the loans.[1]

§ 27. **A mere agreement of parties is not equivalent to an actual or symbolical delivery.**[2] The maker of a note, to induce a surety to continue his liability upon it for a year, verbally agreed to turn over to him a horse, and that the horse should be the surety's property, and he should have the right to go and take it in case the debtor did not pay the note. The horse was not present at the time of this agreement, nor was it ever delivered to the surety; but the latter being compelled to pay the note, went upon the debtor's premises and took the horse. In an action for the recovery of the horse, it was held that the agreement conferred no lien upon it by way of pledge, and no title by way of mortgage.[3] A debtor being pressed for payment agreed that certain molasses in his distillery should stand as collateral security for the debt, which was thereupon extended by time notes. He pointed out four hundred hogsheads of molasses, to be taken from a particular place from a larger quantity on storage. It was agreed that the debtor should send the rum to be distilled from the molasses to the creditor, who should sell it, and apply the proceeds to the payment of the debt. It was held that there was no pledge of the molasses, because there was no delivery of possession. Re-

[1] Fidelity Insurance T. & S. D. Co. v. Roanoke Iron Co., 81 Fed. Rep. 439.

[2] Caffin v. Karwan, 7 La. Ann. 221; Collins v. Buck, 63 Me. 459; Gale v. Ward, 14 Mass. 352, 7 Am. Dec. 223; Tucker v. Buffington, 15 Mass. 477; Keiser v. Topping, 72 Ill. 226; Nisbit v. Macon Bank & Trust Co., 12 Fed. Rep. 686; Cardinell v. Bennett, 52 Cal. 476.

[3] Ceas v. Bramley, 18 Hun (N. Y.) 187; and see Beeman v. Lawton, 37 Me. 543.

tention of possession by the debtor was in fact a necessary part of the agreement.[1]

The owner of a ranch kept upon it a large number of dairy cows which he owned. Another person lived upon the ranch, and cared for the cows and milked them. The milk was delivered to the owner, who sold it and divided the net proceeds with the person in charge of the ranch. The owner borrowed a large sum of money and gave, or undertook to give, the cattle in pledge. By direction of the pledgor the cattle were driven into a corral and counted by him and the pledgee and then they were passed back into the pasture. A bill of sale was then given by the pledgor to the pledgee, who gave a lease of the cattle to the person already in charge of them. The relations between the pledgor and the person in charge of them remained the same, except that the latter afterwards refused to give the pledgor any of the cattle for beef as had been the custom. It was held that these facts failed to disclose that actual and continued change of possession demanded in cases of pledge in order that the pledgor's creditors may not successfully attack the transaction.[2]

An agreement to deliver property in pledge can not be enforced after all legal liability upon the debt has ceased. Thus, where a debtor executed a collateral agreement to deliver, on demand, certain property as security for the payment of a debt, a demand made after the debt is barred by the statute of limitations is too late.[3]

A mere understanding between a principal and a surety that a part of certain bonds of the principal held by a bank shall be held for the security of the surety does not operate as a pledge when none of the bonds are delivered for that purpose either to the bank for the surety, or to the surety.[4]

[1] Smyth v. Craig, 3 W. & S. (Pa.) 14.

[2] George v. Pierce, 123 Cal. 172, 176, 55 Pac. Rep. 775, affirmed 56 Pac. Rep. 53. The court, Garoutte, J., said: "To sustain the validity of a pledge, as against creditors of the pledgor, there must be an open and visible change of custody of the property."

[3] Shaw v. Silloway, 145 Mass. 503, 14 N. E. Rep. 783.

[4] Seymour v. Hendee, 54 Fed. Rep. 563.

§ 28. **An agreement to pledge as distinguished from an actual pledge** creates no lien as against a creditor of the pledgor, or as against his assignee in bankruptcy.[1] Equity will not regard as done that which one has agreed to do, when to so regard it would be to the injury of third persons who have acquired rights before the execution of the agreement. An agreement to make a pledge will not avail as against the pledgor's assignee in bankruptcy, when the pledge is not actually made in pursuance of the agreement until within four months before the adjudication in bankruptcy, and is then made with a view of giving the pledgee a preference, and he has reasonable cause to believe the pledgor to be insolvent.[2]

An intent to pledge does not constitute a pledge, but there must be delivery to the pledgee; and therefore, where bonds held by the president of a railroad company for the company never passed from his control, there was not a pledge of them to a syndicate of which he was a member, though he may have intended to pledge them to secure loans made by the syndicate to the company, there being no actual delivery of them to the trustee of the syndicate who held the notes of the company.[3]

An agreement was made by a debtor to pledge a horse and carriage which were in the care of a third person, the debtor giving an order on such person for the delivery of the property. Before the order was presented the property was attached by another creditor of the debtor. It was held that the agreement was of no effect as a pledge, as the pledge was not completed by a delivery.[4]

An executory contract to deliver certain shares of stock as collateral security for a debt will not be enforced by a court of equity after the debtor has died insolvent, when his other creditors would be injured by the enforcement of the contract.[5]

[1] Hitchcock v. Hassett, 71 Cal. 331, 12 Pac. Rep. 228.

[2] Nisbit v. Macon Bank & Trust Co., 12 Fed. Rep. 686; Copeland v. Barnes, 147 Mass. 388, 18 N. E. Rep. 65.

[3] Hook v. Ayers, 80 Fed. Rep. 978.

[4] Rowell v. Claggett, 69 N. H. 201, 41 Atl. Rep. 173.

[5] City Fire Ins. Co. v. Olmsted, 33 Conn. 476.

As between the parties themselves an actual delivery may not be necessary. The possession may be regarded, constructively, where the contract places it.[1] Upon this point Mr. Justice Loomis, in a recent case, said: "We have observed for several years a growing laxity on the part of judges and jurists in the application of the principles of constructive pledge delivery, until now it must be confessed there are authorities of great weight and respectability that hold that, as between the parties themselves, an actual delivery may not be necessary, and that the possession may be regarded constructively where the contract places it.'"[2]

§ 29. **An engagement to deliver property in pledge amounts to nothing as security.** The pledgee acquires no right of property until delivery is actually made.[3]

A delivery can not be dispensed with by a written agreement that the party making the pledge will hold it as the bailee of the pledgee.[4]

The cashier of a bank, to secure a creditor who had accommodated it, sealed up a package of its own bank bills and left them in its vault, indorsing thereon that the package was intended as such security; but no entry of the transaction was made upon the books of the bank, and the package remained under the absolute control of the officers of the bank. Consequently it was held that the creditor acquired no legal or equitable lien upon the bills.[5]

[1] Keiser v. Topping, 72 Ill. 226.

[2] Huntington v. Sherman, 60 Conn. 463, 467, 22 Atl. Rep. 769, per Loomis, J., citing Keiser v. Topping, 72 Ill. 226; Tuttle v. Robinson, 78 Ill. 332; Martin v. Reid, 11 C. B. (N. S.) 730; Easton v. German American Bank, 127 U. S. 532, 8 S. Ct. Rep. 1297.

[3] Silverman v. McGrath, 10 Bradw. (Ill.) 413; Propst v. Roseman, 4 Jones (N. C.) 130; D'Meza's Succession, 26 La. Ann. 35.

[4] First Nat. Bank v. Nelson, 38 Ga. 391, 95 Am. Dec. 400; Hitchcock v. Hassett, 71 Cal. 331, 12 Pac. Rep. 228.

[5] Davenport v. City Bank, 9 Paige (N. Y.) 12. The transaction was evidently made for the purpose of evading a statutory provision limiting the amount of bills which a bank could issue. Where the bills of a bank are legally pledged for the security of a debt due another, so as to entitle him to hold and use such bills for his indemnity, they must be considered as issued and in circulation

§ 30. **Obviously a pledge of future property is not effectual until the property comes into existence,** and is delivered to the pledgee. As to such property there can only be an agreement to pledge it, because there can be no delivery to make the pledge effectual.[1]

There can be no valid pledge of a runaway slave, or of an anchor lost overboard in the bay, because there can be no delivery in such case, though there might be a valid mortgage of such property.[2] Although there can not be a pledge, technically speaking, of a chattel not in existence, there may be a contract in the nature of an agreement to pledge, which will attach to the chattel as soon as it is produced. Thus, where it was stipulated by a brick-maker that the lessees of a brick-yard should retain the bricks to be made by him as security for their advances to the brick-maker, the bricks were held to be pledged as fast as they were manufactured.[3]

§ 31. **The pledgor of future property upon subsequently acquiring it is estopped as against his pledgee** from asserting that he did not own it when he pledged it.[4] If the pledgor at the time of the pledge made a delivery of the property, which would be effectual had the pledgor owned it at that time, such delivery may enure to the benefit of the pledgee upon the pledgor's subsequently acquiring title, so as to make the pledge effectual. Thus, a person who had verbally bargained for a quantity of flour which was then stored in a warehouse obtained a loan on a pledge of it by pointing it out, and de-

within the true intent of the statute limiting such issues, as in such a pledge the bills are no longer under the control of the bank. But in the present case there was a mere attempt to evade the law; for the bills remaining in the control of the bank the hypothecation was merely fictitious.

[1] Gittings v. Nelson, 86 Ill. 591; Smithhurst v. Edmunds, 14 N. J. Eq. 408.

[2] Owens v. Kinsey, 7 Jones (N. C.) 245.

[3] Macomber v. Parker, 14 Pick. (Mass.) 497; and see Smith v. Atkins, 18 Vt. 461; Goodenow v. Dunn, 21 Me. 86; Ayers v. South Australian Banking Co., L. R. 3 P. C. 548.

[4] Woodward v. Crump, 95 Tenn. 369, 371, 32 S. W. Rep. 195.

livering a warehouse receipt to the lender. At that time he had not acquired title to the flour, but afterwards, upon paying the price of the flour, did acquire title, and received from the vendor an order for it upon the warehouseman. In the meantime a third person having become possessed of it without right, the pledgee resorted to an action of replevin to recover it. It was held that he was entitled to recover, on the ground that the pledgor's subsequent acquisition of title enured to the benefit of the pledgee, and that he having the warehouse receipt which entitled him to possession, there was no occasion for a new delivery or any other ratification of the pledge.[1]

§ 32. **The increase of property pledged** is pledged with the property;[2] for although it does not come into existence until after the pledge is made, it is an incident of the thing pledged, and with that is in the pledgee's possession.

§ 33. **That the goods are unfinished** when given in pledge, and are to be finished afterwards at the expense of the pledgor, is no obstacle to confirming and maintaining the pledge.[3]

§ 34. **But possession may be held by a third person for the pledgee,** when such person will be considered as the pledgee's agent.[4] And so if two or more persons be jointly in possession of the property of another, the latter may pledge it to one of such joint holders, and the pledge will be good if both or all of them have knowledge of the pledge, and assent to hold the property for the pledgee.[5] A delivery of property in pledge to

[1] Goldstein v. Hort, 30 Cal. 372.

[2] So provided by Statute in *California. North Dakota:* Codes 1895, § 4747. *South Dakota:* Annot. Stats. 1899, § 5598. *Montana:* 1 Codes 1895, Civ. Code, § 3893. *Georgia:* Code 1895, § 2965; Hunsaker v. Sturgis, 29 Cal. 142. See Jones on Chattel Mortgages, § 149.

[3] Sumner v. Hamlet, 12 Pick. (Mass.) 76; and see Glover v. Austin, 6 Pick. (Mass.) 209; Moors v. Wyman, 146 Mass. 60, 15 N. E. Rep. 104; Brewster v. Hartley, 37 Cal. 15.

[4] Brown v. Warren, 43 N. H. 430; Tibbetts v. Flanders, 18 N. H. 285; McCready v. Haslock, 3 Tenn. Ch 13; Johnson v. Smith, 11 Humph. (Tenn.) 396; Weems v. Delta Moss Co., 33 La. Ann. 973; First Nat. Bank v. Harkness, 42 W. Va. 156, 166, 24 S. E. Rep. 548, quoting text. Lewis v. Dillard, 76 Fed. Rep. 688, 22 C. C. A. 488.

[5] Brown v. Warren, 43 N. H. 430.

one person as security for a debt due him, and also as security for debts due several other creditors, the terms of the pledge having been assented to, is a good pledge for all of them, and gives them all a lien upon the property.[1]

In California,[2] North Dakota,[3] South Dakota,[4] and Montana,[5] it is provided by statute that a pledgor and pledgee may agree upon a third person with whom to deposit the property pledged; who, if he accepts the deposit, is called a pledge-holder. A pledge-holder for reward can not exonerate himself from his undertaking; and a gratuitous pledge-holder can do so only by giving reasonable notice to the pledgor and pledgee to appoint a new pledge-holder, and, in case of their failure to agree, by depositing the property pledged with some impartial person, who will then be entitled to a reasonable compensation for his care of the same. A pledge-holder must enforce all the rights of the pledgee, unless authorized by him to waive them. A pledgee, or a pledge-holder for reward, assumes the duties and liabilities of a depositary for reward. A gratuitous pledge-holder assumes the duties and liabilities of a gratuitous depositary.

A trustee or pledge-holder may secure and hold property in pledge as security for debts of the pledgor to several persons, all of whom will have a lien upon the property according to the terms of the pledge.[6]

[1] Macomber v. Parker, 14 Pick. (Mass.) 497; Danforth v. Denny, 25 N. H. 155.

[2] Civil Code, §§ 2993-2998.

[3] R. Codes, §§ 4746, 4751.

[4] Annot. Stats. 1899, § 5602.

[5] 1 Codes 1895, Civ. Code, § 3897.

[6] Macomber v. Parker, 14 Pick. 497; Danforth v. Denny, 25 N. H. 155. In First National Bank v. Harkness, 42 W. Va. 156, 24 S. E. Rep. 548, a party residing in Philadelphia gave the following order to his agent in the city of Parkersburg: "Will please hold to the order of trustees of the estate of Samuel Simes, deceased, my stock of lubricating oil stored in my oil tank in Parkersburg, W. Va., as collateral security for the return of $7,500, borrowed and received of them, and oblige, truly, Wm. W. Harkness." This paper was indorsed: "Accepted, Parkersburg, W. Va., May 23rd, 1888, signed ——." Said —— being at the time the agent of said Harkness in possession of said oil. It was held the acceptance of such order transferred the possession of the oil to said trustees, and the oil was thereby pledged for the payment of said borrowed money, and that an attachment subsequently

A lumber man, in consideration of advances to be made to him, agreed to ship to the merchant making such advances all the timber he should cut upon certain lands, the merchant agreeing to sell the timber and apply the proceeds towards the payment of such advances, and to pay the balance to the lumber man. It was further stipulated that the lumber should be delivered, as fast as it should be ready for shipment, to raftsmen, such delivery to be regarded as a delivery to the merchant. It was held that such delivery of the timber constituted a valid pledge. The owner of the land upon which the timber was cut sold it to the lumber man, taking a note for the purchase-price, with an agreement that he should have a lien for the payment of the note upon all timber in the purchaser's possession at the date of the maturity of the note. It was held that such lien was subordinate to the pledge as to all the timber delivered to the raftsmen before the maturity of the note, and that the owner of the land could not maintain a bill to enforce his lien upon timber so delivered, without an offer to discharge the pledge.[1]

Where a partnership undertook to pledge a stock of merchandise to trustees as security for the claims of certain creditors, and the agreement between the parties was that the managing partner should be continued in employment, at a salary, subject to the supervision of the trustees, who did not take personal possession, and the business was continued under the control of the same manager, and with the same employes as before, and the conspicuous signs of the partnership were allowed to remain, with a small and less conspicuous sign added, containing the names of the trustees designated as successors to the firm, and the business continued to be advertised extensively in the name of the firm, there was no sufficient change of possession to prevent seizure of the property under attachment by another creditor of the firm.[2]

levied upon said property as the property of said Harkness would be subject to the lien created by said pledge.

[1] Nobles v. Christian & Craft Grocery Co., 113 Ala. 220, 20 So. Rep. 961.

[2] Lilienthal v. Ballou, 125 Cal. 183, 57 Pac. Rep. 897.

§ 35. **A delivery of goods to a workman or clerk employed by the pledgor,** and possession by such workman in behalf of the pledgee, are sufficient to create and continue the lien.[1] Thus, a manufacturer of cloth having agreed to give a creditor security on goods in process of manufacture, authorized the finisher employed by him to select and hold a certain number of pieces of cloth for the use of the creditor, and the workman at the creditor's request selected the goods and removed them to another room in the factory, where he worked, and gave notice of the fact to the manufacturer and to his own attendants. The selection and appropriation of the goods were regarded as creating a lien as effectual as if the manufacturer himself had selected and set them apart. Moreover, the relation of the workman to the manufacturer did not affect his possession of the goods in behalf of the creditor under his special authority. To constitute an effectual possession it was not necessary that the goods should be removed from the premises of the manufacturer. It was sufficient that they were so far in the custody of the workman that he could at all times have legal control of them, and give notice of the lien to any one interfering with his custody of them, and remove them, if necessary for the protection of the pledgee.[2]

A manufacturing company gave to a creditor a paper acknowledging that it had pledged to him certain machinery, tools and goods in its factory, and the superintendent of the factory was requested and assented to hold possession of the chattels for the pledgee. These remained in the factory, and the superintendent exercised the same control over them after as he had before the pledging. Subsequently another creditor of the company, without knowledge of this transaction, and having been informed by the superintendent that there were no liens upon the machinery, tools and goods in the factory, took a mortgage upon them to secure a debt and a loan. It was held that the pledge was invalid as against the mortgage.

[1] Combs v. Tuchelt, 24 Minn. 423; Lanaux's Succession, 46 La. Ann. 1036, 15 So. Rep. 708.

[2] Sumner v. Hamlet, 12 Pick. (Mass.) 76.

Mr. Justice Reed, delivering the opinion of the court, said: "The chattels pledged, as we have seen, consisted of the machinery and tools used in the manufacture of tools, and of the manufactured goods. They were, before the alleged pledging, in the factory of the owners. After the alleged pledging, they were still in the factory of the owners. * * * But it is said that the superintendent was there, and he had promised to hold possession of the chattels for the pledgee. The superintendent was and had been the superintendent of the owners. In exercising control over the operations of the factory, of its machinery and of its products, he was probably the most conspicuous representative of the company. The pledgee left the company in possession without any visible change in the position of the chattels. The pledgee left the chattels in the very position calculated to lead any person dealing with them to the belief that the company held towards them the same relation it had always held.

"While this condition of things existed, the superintendent asserted to the agent of the complainant that there was no lien upon the chattels, and upon the faith induced by that assertion, and of what he saw, the complainants made their loan and took their mortgage. The defendant is responsible for the condition of affairs and the occurrences which misled the complainants. The selection of the superintendent, occupying the place he did, was such as to impose upon the pledgee responsibility for his conduct. He was placed where his words were in accordance with his surroundings and his interests.

"There were no means for a creditor or purchaser to ascertain the true posture of affairs by any visible feature, and the person selected by the pledgee to represent him, instead of asserting, repudiated his claim to possession."[1]

§ 35a. **But if the clerk or other employe of the pledgor allows the pledged goods to be confused and intermixed with his employer's unpledged goods,** so that the two classes become indistinguishable, the pledgee fails to retain such possession

[1] Dirigo Tool Co. v. Woodruff, 41 N. J. Eq. 336, 343, 344, 7 Atl. Rep. 125.

of the goods as enables him to maintain the lien of his pledge. Thus a banker loaned money to a merchant, carrying a stock of goods in his store, taking an agreement that all the goods transferred by the latter to the former should be held only as security for the loans made, whether present or future. About once a month the merchant executed to the banker a bill of sale of the goods in his store. Soon after the date of each bill, the banker took possession of the goods, by touching some of them, by appointing the merchant's clerk as his agent to take and hold possession, and by his acceptance of such agency. As new bills of sale were received, the banker gave written orders to the clerk to deliver to the merchant in gross amounts portions of the goods included in former bills of sale. The merchant made sales from all the goods in the store without regard to whether or not they had been released by the banker, and this was permitted by the clerk, who, whenever he thought the amount of an order had been fully drawn, would get a new one. No separation of the goods covered by these orders was made, and new goods as they came in, sometimes between the date of the bill of sale and the day of taking possession, were mingled with the old. The proceeds of the sales went to the banker, who paid the clerk solely. The merchant finally went into insolvency, and his assignee took possession of the goods. It was held, in an action of replevin by the banker, that he had failed to retain such possession of the goods as to enable him to maintain his lien.[1] The court regarded the arrangement as one made with the obvious purpose, or, at any rate, with the effect of enabling the merchant to carry on his business in the usual manner and without exciting suspicion; and there never was a day, so far as it appears, when he might not have sold any particular piece or parcel of goods in his store without his violating his understanding with the banker. * * * There was no attempt to keep distinct and separate any specific portions of the stock of goods as those which were subject to the pledge. This course of business was inconsist-

[1] Moors v. Reading, 167 Mass. 322, 45 N. E. Rep. 760.

ent with the view that the banker retained possession of any specific part of the goods.

§ 36. **A symbolical or constructive delivery is sufficient,** wherever such a delivery would be sufficient in case of a sale of the same property. Such a delivery may be made of all property incapable of manual delivery. Thus logs in a boom may be effectually pledged by going in sight of them and pointing them out to the pledgee.[1] It is not necessary that the pledgee should place any one in charge over such property, or that he should immediately take any other possession of it than the possession constructively given.

If the pledgee is already in possession of the thing pledged, though for another purpose, the pledge immediately becomes effectual without any further delivery.[1]

A tenant occupying a shop agreed with the owner, who was his landlord, that a quantity of tools in the shop, of which a list was made, should be pledged to the owner for an overdue rent bill, the tools to remain in the shop and to be used by the pledgor in his business. Afterwards the landlord gave the tenant notice to quit possession of the shop, and the latter did quit possession and removed the tools to his residence, where he continued to carry on his business until they were replevied by the landlord claiming them under his pledge. The court held that there had been no actual delivery of the tools to the pledgee, and that as he had no right to the immediate possession of the property he could not maintain his action.[2]

"The circumstances ordinarily furnishing a basis for constructive delivery are wholly wanting; the goods were not at sea, nor in a warehouse, nor were they too ponderous to be readily moved, nor were they placed within the power and con-

[1] Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74; Nevan v. Roup, 8 Iowa 207; Whitney v. Tibbitts, 17 Wis. 359; First Nat. Bank v. Harkness, 42 W. Va. 156, 166, 24 S. E. Rep. 548, quoting text; Hutchins v. Gilchrist, 23 Vt. 82, 86; Dubois v. Spinks, 114 Cal. 289, 294, 46 Pac. Rep. 95. See Thorndike v. Bath, 114 Mass. 116, 19 Am. Rep. 318, a case of sale; Geilfuss v. Corrigan, 95 Wis. 651, 670, 70 N. W. Rep. 306.

[2] Brown v. Warren, 43 N. H. 430; Parsons v. Overmire, 22 Ill. 58.

trol of the plaintiffs. It is true the plaintiffs owned the shop where the goods were, but the defendant as lessee held lawful possession and how long he would or could so hold was uncertain. The pledge agreement contemplated no time for surrendering the possession of the shop to the plaintiffs.'"[1]

A delivery of samples of goods is not a symbolical delivery of the goods themselves sufficient to constitute a delivery in pledge.[2]

§ 37. **A delivery of a document of title, which serves to put the pledgee in possession of the goods,** is equivalent to an actual delivery of them.[3] A delivery of a bill of lading,[4] of a warehouse receipt[5] or wharfinger's certificate, is as effectual a delivery of the goods represented by such document as would be a delivery of the goods by actual manual delivery.[6] The delivery of the keys of a warehouse may be made an effectual delivery of the goods that are in it.[7]

A delivery of goods to a carrier, with intent on the part of the owner to pass the property to the consignee, who has made advances upon them, is an effectual delivery. The carrier is then the bailee of the person to whom, and not of the person by whom, the goods are sent.[8] A delivery of a savings bank book to a third person, for delivery to a creditor as security for a debt, creates a valid pledge of the book and deposit.[9]

[1] Huntington v. Sherman, 60 Conn. 463, 468, 22 Atl. Rep. 769, per Loomis, J.

[2] Thurber v. Oliver, 26 Fed. Rep. 224.

[3] Ryall v. Rolle, 1 Atk. 165, 176; First Nat. Bank v. Harkness, 42 W. Va. 156, 168, 24 S. E. Rep. 548, quoting text.

[4] Meyerstein v. Barber, 36 L. J. C. P. 48, affirmed H. 289, L. R. 2 C. P. 38, 661; Moors v. Wyman, 146 Mass. 60, 15 N. E. Rep. 104.

[5] National Exchange Bank v. Wilder, 34 Minn. 149, 24 N. W. Rep. 699.

[6] Dows v. Nat. Exch. Bank, 91 U. S. 618; First Nat. Bank v. Kelly, 57 N. Y. 34; Cartwright v. Wilmerding, 24 N. Y. 521; Rice & Bullen Malting Co. v. Bank, 185 Ill. 422, 56 N. E. Rep. 1062, affirming 86 Ill. App. 136; Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. Rep. 24; Taylor v. Turner, 87 Ill. 296; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Canadian Bank v. McCrea, 106 Ill. 281.

[7] Ryall v. Rolle, 1 Atk. 165, 171, per Burnett, J.; Atkinson v. Maling, 2 T. R. 462; Tatham v. Andree, 1 Moore P. C. (N. S.) 386; Hilton v. Tucker, 39 Ch. D. 669.

[8] Toms v. Whitmore, 6 Wyo. 220, 44 Pac. Rep. 56.

[9] Boynton v. Payrow, 67 Me. 587.

When a mill company transfers warehouse receipts for grain to a bank as collateral security for the repayment of advances, the bank has a lien dependent on possession and while the grain remains in the warehouses of third parties and the bank holds the receipts, it has sufficient possession to keep its lien valid; but when the receipts are indorsed and delivered, together with the grain, to the mill company, in order that it may crush the grain, the lien of the bank as against creditors of the mill company is extinguished.[1]

But writings pertaining to a transfer of property in pledge, not accompanied by an actual and continued charge of possession, do not constitute a pledge valid as against the pledgor's creditors.[2]

§ 38. **A pledge or contract for a pledge, ineffectual for want of delivery, may be rendered valid by a subsequent delivery,** even as against an intermediate creditor at large of the pledgor. Of course such subsequent delivery would not prevail against a creditor who had, between the time of the making of the contract and taking possession under it, acquired a specific lien upon the thing pledged by attachment or levy of execution. The only other obstacle which could prevent such a transaction from being effectual would be the intervention of fraud. But such a transaction is not fraudulent in itself, and fraudulent intent in it is a question for the jury.[3]

Under a statute requiring an immediate delivery of the pledge, what constitutes such a delivery is a question of fact. The character of the property, and its situation, and all the circumstances, must be taken into consideration in determining whether there was a delivery within a reasonable time so as to meet the requirements of the statute.[4]

[1] Salinas City Bank v. Graves, 79 Cal. 192, 21 Pac. Rep. 732.

[2] George v. Pierce, 123 Cal. 172, 176, 55 Pac. Rep. 775, affirmed 56 Pac. Rep. 53.

[3] Hilton v. Tucker, 39 Ch. D. 669; Parshall v. Eggert, 54 N. Y. 18; reversing 52 Barb. 367; Prouty v. Barlow, 74 Minn. 130, 76 N. W. Rep. 946; Baker v. Pottle, 48 Minn. 479, 51 N. W. Rep. 383; Clarke v. National Citizens' Bank, 74 Minn. 58, 76 N. W. Rep. 965, 1125.

[4] Samuels v. Gorham, 5 Cal. 226; Dubois v. Spinks, 114 Cal. 289, 293, 46 Pac. Rep. 95.

An agreement of a debtor authorizing his creditor to take and sell certain property in the hands of a third person, upon whom he gives an order for the same, is a mere executory agreement for a pledge, and is ineffectual unless the creditor obtains possession of the property.[1]

§ 39. **A subsequent delivery, if made before other rights have intervened, is effectual.** Thus, a merchant obtained from a banking house a discount of his note, having attached to it a receipt headed with his name, place of business and the date, in the following words: "Received in store, for the account of A. (the bankers), subject to their order, the following named property, as security to my note given this day for fourteen hundred and eighty dollars, for twenty days from date," with a description of the property. The receipt was signed by the merchant, but the property was not immediately delivered to the bankers, nor until after the note became due and was dishonored. The merchant had in the meantime absconded. But one of the pledgees went to the store where the property was, and demanded possession of it from the clerk in charge, and received from the latter the keys of the building. An hour afterwards the property was seized by the sheriff upon an attachment in favor of a creditor of the pledgor. In a suit by the bankers against the sheriff to recover the property, the supreme court held the delivery of the property, or rather the possession of it gained by the pledgees, was not sufficient as against the attaching creditor. But upon appeal this decision was reversed, and it was held that a contract for a pledge, ineffectual for want of delivery, may be made valid by a subsequent delivery; and that nothing but the intervention of fraud, or the acquiring by a creditor of a specific lien upon the thing pledged, will prevent the perfecting of the pledgee's right.[2]

[1] Bidstrup v. Thompson, 45 Fed. Rep. 452; Rowell v. Claggett, 69 N. H. 201, 41 Atl. Rep. 173; Brown v. Wiggins, 16 N. H. 312; Atkinson v. Foster, 134 Ill. 472, 25 N. E. Rep. 528. And see Barnard v. Hawks, 111 N. C. 333, 16 S. E. Rep. 329.

[2] Parshall v. Eggert, 54 N. Y. 18, reversing 52 Barb. 367.

"Certainly there is no rule of law," say the court, "which requires a pledge in writing to be filed as a chattel mortgage; nor is it consonant with any rules for the construction of statutes to borrow such a requirement as to pledges from the positive provisions which, when enacted, were introductive of a new rule, and which declared unfiled chattel mortgages absolutely void as against creditors; nor is there any warrant for saying that, because a chattel mortgage unfiled could not be afterward filed with the effect to cut off the right of an intermediate creditor to avoid it as under the statute conclusively fraudulent, therefore, a pledge of undelivered goods can not be made effectual against an intermediate creditor by delivery in the absence of fraud. Though a contract of pledge should be regarded, when unaccompanied by delivery, as within the other provisions of the statutes in regard to conveyances and contracts as to personal property, the question of fraud then arising would be a question of fact upon which the party would have a right to go to the jury. In the absence of any intermediate right, the parties could perfect a written contract of pledge by subsequent delivery."

IV. *Possession is Essential to Continue a Pledge.*

§ 40. **It is a well settled principle that a delivery back of the possession of the thing pledged terminates the pledgee's title,** unless such redelivery be for a temporary purpose only, or be to the pledgor in a new character, such as special bailee, or agent.[1] Thus, a pledgee of a carriage loses his lien by permit-

[1] Ryall v. Rolle, 1 Atk. 165; Reeves v. Capper, 5 Bing. N. C. 136, 140, 141; Harper v. Godsell, L. R. 5 Q. B. 422; Citizens' Nat. Bank v. Hooper, 47 Md. 88; Kimball v. Hildreth, 8 Allen (Mass.) 167; Farlow v. Ellis, 15 Gray 229; Scudder v. Bradbury, 106 Mass. 422; Haskins v. Warren, 115 Mass. 514; Upton v. Sturbridge Cotton Mills, 111 Mass. 446; Wilkie v. Day, 141 Mass. 68, 6 N. E. Rep. 542; Thompson v. Dolliver, 132 Mass. 103; Wyeth v. Nat. Bank of Brighton, 132 Mass. 597; Walcott v. Keith, 22 N. H. 196; Look v. Comstock, 15 Wend. (N. Y.) 244; Fletcher v. Howard, 2 Aik. (Vt.) 115, 16 Am. Dec. 681; Day v. Swift, 48 Me. 368; Shaw v. Wilshire, 65 Me. 485; Barrett v. Cole, 4 Jones (N. C.) 40; Smith v. Sasser, 4 Jones (N. C.) 43; Bodenhammer v. Newsom, 5 Jones (N. C.) 107, 69 Am. Dec. 775; First

ting the pledgor to retain possession, and let it for hire for his own benefit. The pledgor's possession in such case is absolute and unqualified, although the pledgee restricted its use to the pledgor's most careful drivers.[1] But a pledgee of a carriage would not affect his lien by temporarily putting it into the hands of the pledgor for the purpose of having repairs made upon it. The owner is but a special bailee for the creditor in such case, and his possession for this purpose does not amount to an interruption of the pledgee's possession.

A temporary loan of a carriage by the pledgee to the pledgor would not invalidate the pledge, and the pledgee may recover it of the pledgor, if he refuses to return it, by an action of replevin.[2] But where a horse was pledged, and was immediately delivered back to the owner upon an agreement that he should keep and use the horse until the ensuing autumn, when the pledgee was to sell the horse and pay himself out of the proceeds, it was held that the horse in the owner's hands was liable to be seized and sold upon execution by a creditor of his.[3] And so where a horse taken in pledge was returned to the pledgor that he might have the horse to use, it was held that the lien of the pledge was thereupon destroyed, and a purchaser of the horse from the debtor would acquire a good title as against the pledgee;[4] or that a creditor of the pledgor might attach the horse and hold it against the pledgee.[5]

§ 41. **Possession and control of the pledge obtained by the wrongful act of the pledgor,** without the assent of the pledgee, will not create a forfeiture of the lien, nor defeat his right to recover damages for an injury to the pledge, or for a conversion of it.[6] The pledgee can not be deemed to have released

Nat. Bank v. Nelson, 38 Ga. 391, 95 Am. Dec. 400; Geddes v. Bennett, 6 La. Ann. 516; Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; McFall v. Buckeye Grangers' Warehouse Assn. (Cal.), 55 Pac. Rep. 253; Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245; Britton v. Harvey, 47 La. Ann. 259, 267, 16 So. Rep. 747; Atlanta Guano Co. v. Hunt, 100 Tenn. 89, 98, 42 S. W. Rep. 482, quoting text.

[1] Walker v. Staples, 5 Allen (Mass.) 34.

[2] Cooper v. Ray, 47 Ill. 53.

[3] Barrett v. Cole, 4 Jones (N. C.) 40.

[4] Day v. Swift, 48 Me. 368.

[5] Colby v. Cressy, 5 N. H. 237.

[6] Walcott v. Keith, 22 N. H. 196.

his lien when the possession of the pledge has been obtained by the pledgor through deception and false pretenses.[1] A pledgor may be guilty of stealing the pledge from the pledgee, although the pledgor is the general owner, and the pledgee has no title to it but only a special property. The property, in an indictment for larceny, may be laid in the special owner.[2]

§ 42. **Possession of the property by the pledgor after it is pledged is not conclusive evidence of fraud,** but is *prima facie* evidence of it. Such possession may be explained and proved to be a possession by the pledgor as agent or servant of the pledgee.[3] If the circumstances make out a good reason for giving the custody and apparent control of the property to the pledgor, who undertook to act as the pledgee's agent, there may not even be any evidence of fraud; and at most the pledgor's possession will only be evidence, either that the pledge has been abandoned, or that the transaction was fraudulent.[4] Where a wagon-maker and a blacksmith entered into an arrangement for building wagons, whereby the former was to do the wood-work and the latter the iron-work, and also to furnish the materials for the wood-work, and as security therefor was to have a lien upon the wagon-maker's interest in the wagons, upon an attachment of the wagons as the property of the latter by another creditor, it was held that the arrangement constituted a pledge of the wagon-maker's interest in the property to the blacksmith, and that when wagons came into the possession of the latter, he became a pledgee in possession, and was entitled to retain possession until his claim was paid.[5] At the time of the attachment it appeared that the pledgee was in exclusive possession of the wagons, which were upon his own premises, and were marked with his name as maker. The pledgor was, however, at that time engaged in painting one of the wagons. But it was considered that this fact, when viewed

[1] Bruley v. Rose, 57 Iowa 651, 11 N. W. Rep. 629.

[2] Bruley v. Rose, 57 Iowa 651, 11 N. W. Rep. 629.

[3] Macomber v. Parker, 14 Pick. (Mass.) 497.

[4] *Ex parte* Fitz, 2 Lowell 519; and see Rothermel v. Marr, 98 Pa. St. 285.

[5] Waldie v. Doll, 29 Cal. 555.

in its relation to the subject, and to the attending circumstances, did not show any surrender on the part of the pledgee of the actual possession of the property.[1]

§ 43. **A pledgee may employ the pledgor as his agent to sell goods held in pledge,** and he does not lose his lien by allowing the pledgor to contract in his own name for their sale, or by delivering the goods on his order to the purchaser.[2] By allowing the pledgor to contract in his own name the pledgee takes the usual risk of such an authority; and if the purchaser has paid the agent in full, the pledgee can not reclaim the goods nor recover the price; but will be compelled to look only to his agent for the proceeds. But he also retains the rights of a principal; and, by notifying the purchaser of these rights, he becomes entitled to receive the unpaid purchase money in preference to his agent.[3]

If the pledgee employs the owner to sell the goods pledged, and the latter sells with notice to the purchaser of the pledgee's lien, and moreover renders bills of sale in the latter's name, and the purchaser agrees to pay the price to him, it is wholly clear that the pledgee's rights are fully protected, and in a suit by the pledgee for the price of the goods,[4] the purchaser can not set off a claim against the owner.

The pledgors of a bill of lading representing a specific cargo were under contract to sell a larger quantity of like goods to third parties. The pledgees returned the bill of lading to the pledgors to enable them to obtain delivery of the merchandise and sell on the pledgee's behalf, and account for the proceeds towards satisfaction of the debt. It was held that the pledgees' security was not affected, and they were entitled to the proceeds of the cargo as against the diligence of general creditors of the pledgors.[5]

[1] Waldie v. Doll, 29 Cal. 555.

[2] Thayer v. Dwight, 104 Mass. 254; Rothermel v. Marr, 98 Pa. St. 285; Durfee v. Harper, 22 Mont. 354, 369, 56 Pac. Rep. 582.

[3] Per Wells, J., in Thayer v. Dwight, 104 Mass. 254.

[4] Nottebohm v. Maas, 3 Robt. (N. Y.) 249. See Wharton v. Lavender, 14 Lea (Tenn.) 178.

[5] Northwestern Bank v. Poyntner [1895], A. C. 56.

§ 44. **A pledgee does not lose his lien by permitting the pledgor to have possession of the property for a special and limited purpose,** and not merely for his own use and benefit.[1] Thus the master of a ship having pledged his chronometer to the owners, they permitted him to keep it on board their ship, and use it for the purpose of navigating the ship for a limited period without losing their lien.[2] In like manner, if the pledgee of a convertible railroad bond deliver it to the pledgor to be exchanged for stock of the same company, which is to be returned to the pledgee and substituted for the bond in pledge, but the pledgor neither returns the bond nor the stock, he is liable in trover for the value of the bond. The pledgor receives back the bond in a new character, namely, that of special bailee or agent of the pledgee to exchange it for stock, and the possession of the latter was not thereby impaired.[3]

A banker made advances to leather merchants on hides, for which bills of parcels were given to him, or bills of lading taken to his order or indorsed to him, with power to take possession and sell for his security or reimbursement. He indorsed the bills of lading to the firm to get the hides from the carriers, and gave it the custody upon its express agreement to hold as his agents and to redeliver the identical hides when tanned. It was held that the banker took the title to the

[1] Martin v. Reid, 11 C. B. N. S. 730; Moors v. Wyman, 146 Mass. 60, 15 N. E. Rep. 104; Merchants' Nat. Bank v. Bank of Commonwealth, 139 Mass. 513, 2 N. E. Rep. 89; Wing v. Holland T. Co., 5 N. Y. Supp. 384; Matthewson v. Caldwell, 59 Kan. 126, 134, 52 Pac. Rep. 104; Cooley v. Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. Rep. 141.

[2] Reeves v. Capper, 5 Bing. N. C. 136; Langton v. Waring, 18 C. B. N. S. 315; Way v. Davidson, 12 Gray (Mass.) 465, 466, 74 Am. Dec. 604; Bruley v. Rose, 57 Iowa 651, 654, 11 N. W. Rep. 629; Hutton v. Arnett, 51 Ill. 198; Cooper v. Ray, 47 Ill. 53; Black v. Bogert, 65 N. Y. 601; Collins v. Buck, 63 Me. 459. See, however, Bodenhammer v. Newsom, 5 Jones (N. C.) 107, not in accord with the best authorities.

[3] Hays v. Riddle, 1 Sandf. (N. Y.) 248. The pledgor contended that under the arrangement between the parties, whereby he was to return stock for the bond, the creditor's special property was lost, and changed into a mere right of action upon the debtor's promise to substitute stock, upon which only an action of assumpsit could be maintained.

hides and did not divest it by his indorsement or release of custody.[1]

In case the pledged property is delivered to a third person as pledge-holder for the parties the mere fact that the pledgor, either with or without the knowledge or consent of the pledgee, for a time assists the pledge-holder in taking charge of the property, does not necessarily render the holding of it as a pledge void as to creditors of the pledgor. In such a case, there is a sufficient delivery and continuous change of possession to preserve the lien of the pledgee.[2]

The delivery of a warehouse receipt by the pledgee to the pledgor, to enable the latter to carry out a contract of sale as the pledgee's agent, does not affect his right to the proceeds of the sale as between the parties or as against the purchaser, where the latter was notified of the pledgee's rights before making payment.[3]

And so where the proprietors of a brick-yard contracted it out on shares to a brick-maker, agreeing to advance the money requisite for the making of bricks, and to divide with him the profits, after repayment of the advances, it was further agreed that the bricks, so fast as made, should be pledged to the owners of the yard as security for their advances; but the brick-maker was to keep them in his charge, and sell them at retail, and as often as he got the amount of a hundred dollars from the sales he was to deposit it in bank to the credit of the owners. The bricks were afterwards attached at the suit of a creditor of the brick-maker; but the court held that the owners of the yard had not, by leaving the bricks in the hands of the maker, lost their lien as pledgees of the entire property. This limited authority to sell at retail, in small sums, was no waiver of the possession of the residue by the owners.[4]

[1] Moors v. Wyman, 146 Mass. 60, 15 N. E. Rep. 104; Pratt v. Parkman, 24 Pick. 42, 47; Low v. DeWolf, 8 Pick. 101, 107; Moors v. Kidder, 106 N. Y. 32, 12 N. E. Rep. 818.

[2] Hilliker v. Kuhn, 71 Cal. 214, 16 Pac. Rep. 707; Goldstein v. Nunan, 66 Cal. 542, 6 Pac. Rep. 451.

[3] Rice & Bullen Malting Co. v. International Bank, 185 Ill. 422, 56 N. E. Rep. 1062, affirming 86 Ill. App. 136.

[4] Macomber v. Parker, 14 Pick. (Mass.) 497.

A redelivery of a certificate of stock by a pledgee to his pledgor for the purpose of having it sold by the latter has been held not to terminate the pledge.[1]

A delivery by the pledgee of a promissory note indorsed in blank to the pledgor's attorney or agent for the purpose of collection, who has knowledge of the pledge, does not invalidate the title of the pledgee, who may maintain trover against one who with knowledge of the pledgee's rights purchases the note of the attorney or agent and collects it.[2]

As between the parties a pledge of shares of corporate stock may be effected by indorsement and transfer of the stock certificates, but the transfer, to avail against the creditors of the pledgor, must be accompanied by delivery and continued change of possession; and if the possession of the certificate by the pledgee is only momentary, and it is at once returned to the pledgor, no valid pledge is constituted as against the creditors of the pledgor, and the shares may be attached and sold under execution against him.[3]

§ 45. **A pledgee may maintain an action of trover against his pledgor,** for a conversion of collaterals which the former has returned to the latter for a special purpose. Thus if a creditor has redelivered to his debtor notes and mortgages held as collateral security, in order that they may be collected for the creditor's account, and the debtor fails to return them upon demand, he is liable in trover, or in a statutory action, which is a substitute for trover.[4] The measure of damages in such case is the plaintiff's interest in the collaterals, which can not exceed the amount of the debt secured.

In like manner the pledgee of a promissory note, who has delivered it back to the pledgor under an agreement to return it, or another note, may maintain an action against him for the conversion of the note, although he obtained it without fraud.[5]

[1] Winslow v. Harriman Iron Co. (Tenn. Ch. App.), 42 S. W. Rep. 698.

[2] Carter v. Lehman, 90 Ala. 126, 7 So. Rep. 735.

[3] McFall v. Buckeye Grangers Warehouse Asso., 122 Cal. 468, 55 Pac. Rep. 253.

[4] Hurst v. Coley, 15 Fed. Rep. 645.

[5] Way v. Davidson, 12 Gray (Mass.) 465, 74 Am. Dec. 604.

After the special and temporary purpose for which a pledge has been redelivered to the pledgor has been accomplished, the pledgee may recover it or its value by action.[1]

If a promissory note, held in pledge, is delivered by the pledgee to the pledgor for the purpose of procuring it to be discounted, and a third person advances money upon the note, in good faith, and in ignorance of the pledgee's title, he can retain the note, as against the pledgee, as security for the advance; but if such person knew, at the time the note came into his possession, of the pledgee's title, he can not hold it, as against the latter, either for an advance of money upon it as a loan to the pledgor, or as security for any former indebtedness of the pledgor to him.[2]

§ 46. **The civil law makes practically the same exception as** the common law, in regard to a delivery to the pledgor for a temporary and special purpose, although in general the civil law is more strict than the common law, in requiring permanent and continued possession in the pledgee. Thus Troplong, commenting upon the articles of the Code Napoleon, respecting the pledgee's possession, says:[3] "Though the merchandise be deposited in the creditor's storehouse, it may still need the care of the debtor. Then it is not forbidden to stipulate that he shall continue to attend to it in the interest of the creditor. The important thing is that this clause does not cover a fraud. Aside from this, the possession of the creditor is not incompatible with a certain co-operation of the debtor,—being for the conservation of the thing,—he still being the owner. The creditor does not any the less continue exclusive possessor of the thing. The debtor is none the less dispossessed of it." He instances the pledge of a large quantity of sparkling Burgundy which was delivered to an agent of the creditor, and deposited in a vault of which the agent was to keep the keys, but it was agreed that the debtor should give the wine all nec-

[1] Roberts v. Wyatt, 2 Taunt. 268; Cooper v. Ray, 47 Ill. 53; Hutton v. Arnett, 51 Ill. 198.

[2] Kellogg v. Tompson, 142 Mass. 76, 6 N. E. Rep. 860.

[3] Nantissement, No. 309.

essary care. It sometimes happened that the agent gave the keys to the debtor, and once the latter removed some of the bottles of wine to his own premises. The debtor having failed, his assignee insisted that the pledge was null and void, because the debtor was not dispossessed of the wine. But it was held that there were sufficient reasons for the creditor's employing the debtor to attend to the wine, and that the agent's allowing him to take the keys was a mere matter of convenience, to facilitate the operations of the workmen. But a different result was reached in a case where wines were pledged and the debtors reserved the care of them, and though stored in vaults leased to the creditors, these vaults communicated by open doors with other vaults of the debtors, where their workmen were employed on the wines, and there was nothing to indicate which were pledged and which were not, and nothing to prevent a substitution of other wines; so that the debtors appeared in possession and kept up their credit thereby, which they could not otherwise have done.

§ 47. **A pledgor in possession can give a good title to a bona fide purchaser.** If pledged property which has been redelivered to the pledgor for a special purpose be sold by him, in violation of the agreement under which possession was redelivered to him, the purchaser having acted in good faith can maintain his title against the pledgee.[1] Thus, the fact that the pledgor of a horse obtained possession for a special purpose, such as to drive for a few miles, to visit a relative, upon the promise to return it in a day or two, and while upon the visit traded this horse for another, does not enable the pledgee to recover the horse from the purchaser.[2]

The decisions in these cases rest upon the general principle that one who voluntarily allows personalty to pass into the possession of another, conferring upon him at the same time

[1] Smith v. Sasser, 4 Jones (N. C.) 43; Bodenhammer v. Newsom, 5 Jones (N. C.) 107; Way v. Davidson, 12 Gray (Mass.) 465, 74 Am. Dec. 604, per Metcalf, J.

[2] Bodenhammer v. Newsom, 5 Jones (N. C.) 107.

all the indicia of ownership, is bound by the fraudulent acts of the latter, and can not reclaim the property in the hands of an innocent purchaser for value without notice.[1]

§ 48. **But a pledgor can not defeat the lien of the pledgee by disposing of the property after it has been restored to the latter.** Thus, if the pledge be delivered back to the pledgor for a temporary purpose, and after this is served it be restored to the pledgee, while it is in his possession the pledgor can not mortgage or sell the property, except subject to the interest of the pledgee. The lien of a mortgage made under such circumstances would be subordinate to the interest of the pledgee, and the mortgagee could obtain possession only after paying or tendering the pledgee the amount of the debt secured after its maturity.[2]

[1] Atlanta Guano Co. v. Hunt, 100 Tenn. 89, 98, 42 S. W. Rep. 482, quoting text.

[2] Cooper v. Ray, 47 Ill. 53.

CHAPTER II.

OF THE SUBJECT MATTER AND THE PARTIES.

I. *The Subject Matter in General.*

§ 49. **Every kind of property of a personal nature may be the subject of a pledge,** provided it be in existence, and be capable of actual or symbolical delivery. Formerly, ordinary goods and chattels formed the subject matter of nearly all pledges; but in recent times, negotiable instruments, choses in action, shares of the stock of incorporated companies, bills of lading, and warehouse receipts are the subject matter of the greater number of transactions that come under the designation of pledges. The application of the general principles of the old law of pledges to these modern transactions, in which the paper evidences of values, or the documentary titles to property, are chiefly used, has wrought a new and great development of the law of this subject; and has rendered it necessary to treat separately of each of general classes of these incorporeal things which are now so frequently delivered in pledge. Therefore, the chapters following this will be devoted respectively to the consideration of pledges of negotiable paper, of choses in action, of corporate stocks, of bills of lading, and of warehouse receipts; while the present chapter will be devoted to the consideration of the subject matter of pledges in general.

§ 50. **Property exempted by law from attachment and levy of execution may be pledged** by the owner, who by such act

waives the benefit of the exemption so far as the incumbrance extends.[1] Such an exemption is no abridgment of the right of an owner of property to deal with it voluntarily as he may please, either in selling or pledging it; it is only a protection which he may avail himself of as against the adverse action of his creditors. Moreover, the fact that the owner has pledged property exempt from execution does not subject his interest in it to execution in favor of a general creditor.

§ 51. **There may be a statutory prohibition of the pledging of a particular species of property.** Thus, a pledge of a pension certificate is wholly void whatever be the purpose for which it is made.[2] This prohibition rests upon principles of general public policy. The Roman law prohibited the pledging of a debtor's necessary apparel and furniture, beds, utensils, and tools; his ploughs, and other utensils for tillage; things esteemed sacred; the benevolence, or pension, or bounty of a monarch; and the pay and emoluments of officers and soldiers.[3] In English-speaking countries, although such property is generally exempt from attachment and execution, the debtor is left free to use it as he may choose for the purpose of obtaining loans or securing debts.

II. *The Title of the Pledgor.*

§ 52. **A pledgor by the act of pledging impliedly warrants that he is the general owner of the property pledged;**[4] and he is liable to the pledgee in damages if the property, or any part

[1] Frost v. Shaw, 3 Ohio St. 270; Jones v. Scott, 10 Kan. 33.

[2] Act of Congress July 29, 1848, R. S., § 4745; Payne v. Woodhall, 6 Duer (N. Y.) 169; Moffatt v. Van Doren, 4 Bosw. (N. Y.) 609.

[3] Story Bailm., § 293. So, also, the Code of Jewish law, bearing the name of Moses, forbade the giving in pawn certain implements of husbandry and a widow's raiment. Sir William Jones Bailm., 84.

It has been decided on principles of public policy that the half-pay of an officer is not assignable or attachable. M'Carthy v. Goold, 1 Ball & B. 387, 389; Lidderdale v. Montrose, 4 T. R. 248; Flarty v. Odlum, 3 T. R. 681.

[4] Goldstein v. Hort, 30 Cal. 372; Mairs v. Taylor, 40 Pa. St. 446.

of it, is taken from the latter under a superior title.[1] The pledgor can not, on the ground that he has no title to the pledge, recover in an action against the pledgee. The pledge is valid between the parties, and invalid only as against the true owner of the property. But the fact that the pledgor has no title to the property, authorizes the pledgee to deliver it to the real owner, and exempts the pledgee from all liability to the pledgor for its return to him.[2] But it would seem that the pledgee should not be allowed to set up the title of a third person against the pledgor until such third person has given him authority so to do, or has enforced his own superior right of property.[3]

A pledgor who has no title to the thing pledged at the time he pledges it, but afterwards acquires title, can not set up such title against his pledgee.[4] Of course, if the pledgor has no title to the property, the pledgee will acquire no title by the pledge. The pledgee can take no greater right than the pledgor can confer.[5]

§ 53. **But it is not indispensable in all cases that the pledge should belong to the pledgor.** One may make a valid pledge of property belonging to another if he has the owner's consent

[1] Cass v. Higenbotam, 27 Hun (N. Y.) 406.

[2] Jones on Bailment, p. 83; Cheesman v. Exall, 6 Ex. 341; Jarvis v. Rogers, 13 Mass. 105, 15 Ex. 389. In Cheesman v. Exall, 6 Ex. 341, Pollock, C. B., said: "It may be that a person with whom property is pledged may contract absolutely, and in all events, to deliver back the property to the pledgor; in which case I agree that the former would be answerable in damages for the breach of such contract, though the damages might be nominal only. That, however, is not the ordinary result of the common contract. In that case, the person who pledges impliedly undertakes that the property pledged is his own; and if it turns out not to be so, the pledgee may restore it to the lawful owner." Parke, B., said: "I think that a person with whom property is pledged may set up the *jus tertii*, unless he has entered into an engagement with the person who pledged it to return the property to him."

[3] Story Bailm., § 291; Biddle v. Bond, 6 Best & S. 225; Garth v. Howard, 5 Car. & P. 346, 350; Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245.

[4] § 31; Goldstein v. Hort, 30 Cal. 372.

[5] Waller v. Hanger, 3 Bulst. 17; Hooper v. Ramsbottom, 4 Campb. 121; Cheesman v. Exall, 6 Ex. 341; First Nat. Bank v. Harris, 7 Wash. 139, 34 Pac. Rep. 466.

to use it in this way.[1] Such consent may be either express or implied. But his authority to pledge can not be inferred merely from his possession of the property. Thus, a person to whom a debtor, on leaving the state on account of his pecuniary embarrassments, has given a verbal direction to assist in the settlement of his affairs, has no authority to transfer any property in pledge as security for a debt.[2]

In Louisiana the code provides that a debtor may give in pledge whatever belongs to him. But with regard to those things in which he has an ownership which may be divested, or which is subjected to incumbrance, he can not confer on the creditor, by the pledge, any further right than he had himself. To know whether the thing given in pledge belonged to the debtor, reference must be had to the time when the pawn was made. If at the time of the contract the debtor had not the ownership of the thing pledged, but has acquired it since by what title soever, his ownership shall relate back to the time of the contract, and the pledge shall stand good.[3]

One person may pledge the property of another, provided it be with the express or tacit consent of the owner. But this tacit consent must be inferred from circumstances so strong as to leave no doubt of the owner's intention, as if he was present at the making of the contract, or if he himself delivered to the creditor the thing pawned. Although the property of another can not be given in pledge without his consent, yet so long as the owner refrains from claiming it, the debtor who has given it in pledge can not seek to have it restored until his debt has been entirely discharged.

Tutors of minors and curators of persons under interdiction, curators of vacant estates and of absent heirs, testamentary executors, and other administrators named or confirmed by a judge, can not give in pledge the property confided to their

[1] Story Bailm., § 291; The John W. Cannon, 24 Fed. Rep. 392. This is permitted under Civil Code of *Louisiana*, art. 3142.

[2] Swett v. Brown, 5 Pick. (Mass.) 178.

[3] R. Civil Code 1870, p. 374, arts. 3142–3150. This is in effect a statement of the civil law upon this part of the subject of pledges.

administration without being expressly authorized in the manner prescribed by law.

An attorney can not give in pledge the property of his principal without the consent of the latter, or an express power to that effect.[1] Nevertheless, where the power of attorney contains a general authority to mortgage the property of the principal, this power includes that of giving it in pledge.

The property of cities and other corporations can only be given in pledge according to the rules and subject to the restrictions prescribed on that head by their respective acts of incorporation.

In California[2] and North Dakota[3] it is provided by statute that one who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, can not set up his own title to defeat a pledge of the property made by the other to a pledgee who received the property in good faith, in the ordinary course of business, and for value.

§ 54. **Mere possession of a chattel, though indicative of title, is not title**; and one taking a pledge of it is bound to satisfy himself that the pledgor is the owner; and if he relies solely upon the pledgor's possession, he takes the risk of having to surrender the property to the true owner.[4] Thus, if one puts a chattel into the hands of a mechanic to repair it, the latter can not, by force of his possession, though this be lawful, give any effectual lien upon it by way of pledge.[5]

If one holding goods for safe keeping pledges them with intent to convert the proceeds to his own use, he, in effect, commits a larceny, and the pledgee acquires no title as against the owner, although he deals with the pledgor in good faith.[6]

[1] Reeves v. Smith, 1 La. Ann. 379.

[2] Civil Code, § 2991.

[3] R. Codes 1895, § 4749 of Civ. Code.

[4] Agnew v. Johnson, 22 Pa. St. 471, 62 Am. Dec. 303; Kauffman v. Klang, 16 Misc. 376, 38 N. Y. Supp. 56; Shafer v. Lacy, 121 Cal. 574, 577, 54 Pac. Rep. 72, quoting text; Barstow v. Savage M. Co., 64 Cal. 388, 1 Pac. Rep. 349; Covile v. Hill, 4 Denio 323; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Patton v. Joliff, 44 W. Va. 88, 92, 28 S. E. Rep. 740, quoting text.

[5] Gallaher v. Cohen, 1 Browne (Pa.) 43.

[6] Cox v. McGuire, 26 Ill. App. 315;

Mere possession of a chattel is not evidence of authority to pledge it, even under a statute which provides that one who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it can not set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value.[1] The words of the statute, "for the purpose of making a transfer of it," are words of limitation upon the power of the apparent owner to make the pledge; and that section has no application, where no apparent ownership is conferred for the purpose of sale or transfer, but the property is merely intrusted to another for safe keeping.[2]

If chattels are pledged without authority by a person to whom they have been entrusted by the owner for a special purpose, the pledgee, after notice of the true ownership, and a demand by the owner, which he refuses, is liable to a subsequent purchaser of the owner's rights, in trover, after a demand by such purchaser, although he has sold the chattels since the first demand, and before the second.[3]

§ 55. **One in possession of stolen chattels** can ordinarily give a pledgee no better claim to them than he himself had. Though the pledge be taken in good faith for a valuable consideration, the title of the proper owner is not affected, and he can take the property wherever he can find it.[4] But there is a well-settled distinction between the case of chattels acquired by felony, and the case of chattels acquired by fraud, as regards the title which the possessor may confer.[5] It is everywhere admitted that the title to stolen goods remains in the

Shafer v. Lacy, 121 Cal. 574; Patton v. Joliff, 44 W. Va. 88, 92, 28 S. E. Rep. 740, quoting text; Hartop v. Hoare, 3 Atk. 44, 48; Gottlieb v. Hartman, 3 Colo. 53.

[1] California Civ. Code, § 2991.

[2] Shafer v. Lacy, 121 Cal. 574, 54 Pac. Rep. 72.

[3] Carpenter v. Hale, 8 Gray (Mass.) 157.

[4] Duell v. Cudlipp, 1 Hilt. (N. Y.) 166.

[5] Arendale v. Morgan, 5 Sneed (Tenn.) 703.

proper owner, and continues in him through whatever transfers of possession the goods may pass, except the sales be in market overt under the doctrine of such sales at common law, which doctrine, however, has not been adopted in this country.

§ 56. **But the consequences of a sale or pledge of property held under a contract or transfer duly executed by the proper owner,** though obtained from him by fraud, are very different. The contract or transfer between the immediate parties may be avoided by reason of the fraud, and the defrauded vendor may recover the property from the fraudulent purchaser, or from any one who has received it from him with knowledge of the fraud. But if the fraudulent purchaser has sold or pledged the property to another, who has taken it in good faith for value, the latter can hold it as against the defrauded vendor.[1] In other words, while one holding possession of goods without the title can confer upon a pledgee no rights which the proper owner is bound to respect, one who holds not only the possession but also the indicia of title, though acquired by fraud, can confer upon a pledgee acting in good faith a lien which must be respected by the defrauded vendor.[2] "As, for example, if a man purchases and obtains possession of a specific chattel, and pays for it by a fictitious bill of exchange, or by a check on a banker where he has no funds, and then pledges the article with a party who advances money upon it without any knowledge of the fraud, the pledgee will have a lien for his advances against the vendor who has been defrauded. But if the article has been stolen and then pledged, the pledgee will have no lien upon it as against the owner.'"[3]

§ 57. **Possession alone of a security negotiable by delivery before due is presumptive evidence of title,**[4] but when such

[1] Parker v. Patrick, 5 T. R. 175; White v. Garden, 10 C. B. 919, 926; Jarvis v. Rogers, 13 Mass. 105; Mowrey v. Walsh, 8 Cow. (N. Y.) 238; Hoffman v. Carow, 22 Wend. (N. Y.) 285.

[2] McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341.

[3] Arendale v. Morgan, 5 Sneed (Tenn.) 703, per McKinney, J.

[4] Jarvis v. Rogers, 13 Mass. 105, 15 Mass. 389.

security is proven to have been stolen or otherwise appropriated in fraud of the rights of the owner, then the burden of proof is upon the possessor to show that he took it in good faith and for value. Upon making such proof, his title will prevail, unless the true owner can show bad faith on the part of the possessor; that is, that the possessor has notice, actual or constructive, of the title of the true owner.[1]

§ 58. **But one need not be the sole and absolute owner of a chattel in order to make pledge of it;** for one having a partial interest may pledge that interest, if he be in a position to make an effectual delivery of the thing pledged. Thus, by statute in California,[2] North Dakota[3] and South Dakota,[4] one who has a lien upon property may pledge it to the extent of his lien. But inasmuch as the continuance of a lien depends upon the continued possession of the person claiming it, it would follow that, in order to pledge such interest at common law, the person claiming the lien must empower his pledgee to continue his possession as his servant for the preservation of the lien.[5] If an agent or broker having a lien on goods for a general balance tortiously pledges them as his own to secure his own debt, his pledgee can not hold them as against the principal for even the amount of the lien which the agent had upon the goods.[6]

A mortgagor left in possession of the mortgaged goods, under a mortgage not recorded, may effectually pledge them to one who is ignorant of the mortgage, and has no cause of suspicion or inquiry as to the pledgor's title.[7] If the mortgage be recorded, the mortgagor can pledge his equitable interest or right to redeem.

A pledgor need not be the absolute owner of the property pledged. Thus, a mortgagor of personal property may pledge

[1] Merchants' & Planters' Nat. Bank v. Masonic Hall, 62 Ga. 271; Shelton v. French, 33 Conn. 489.

[2] Civ. Code, § 2990.

[3] R. Codes 1895, § 4748.

[4] Annot. Stats. 1899, § 5599.

[5] M'Combie v. Davies, 7 East 5.

[6] M'Combie v. Davies, 7 East 5.

[7] Lewis v. Stevenson, 2 Hall (N.Y.) 63.

his interest in the property subject to the mortgage, or the mortgagee may pledge his interest subject to the right of redemption. And so, one owning property subject to a lien may pledge his interest, provided he can make a sufficient delivery of it, and the holder of the lien may pledge the property to the extent of his lien upon it.[1]

A legatee or distributee may pledge his interest in the estate of the deceased by giving his pledgee an order upon the executor or administrator for the sum secured by the pledge.[2]

§ 59. **One having only a life interest in a chattel can pledge that interest,** but only that interest. Thus certain plate was left to trustees for the use of the testator's wife during her widowhood, and she pledged it for value to one who had no notice of her limited interest. At her death the pledgee refusing to deliver the plate to the trustees, who claimed it on behalf of the remainder-man, it was held in an action by them that the pledgee had no valid title after the death of the tenant for life, and that he must restore the plate.[3]

§ 60. **When the pledgor has only a limited interest in the thing pledged, the pledgee can not, upon default, sell the property;** but if he can sell any right or title to it, it is only the right or title that he derived from the pledgor. "The right of a pledgee to sell the property pledged, on giving reasonable and proper notice to the pledgor of the time and place of sale, depends upon circumstances. Sometimes the pledgor has only a limited title to the property pledged. He may have only an interest for life, or for a term of years, or he may have simply a lien, or a right by former pledge; still he may pledge the property to the extent of his interest. But the pledgee in all such cases has no right to sell the property on the non-fulfillment of the contract, although he may pursue the proper course for the purpose, for the pledgor has no

[1] Waldie v. Doll, 29 Cal. 555.

[2] Kelly v. Richardson, 100 Ala. 584.

[3] Hoare v. Parker, 2 T. R. 376.

such right to confer. The pledgee must content himself in such cases with holding the possession of the property till his debt is paid, or the interest of his pledgor in the property has expired.'"[1]

§ 61. **An administrator may pledge personal property belonging to the estate**, and the pledgee dealing with him in good faith will obtain a good title, for the legal title to such property is in the administrator, and the purposes of the estate may require such a use of it.[2] But if the administrator violates his trust in so dealing with the property, and the pledgee has knowledge of such violation, his title may be impeached; and he has knowledge of a misapplication of the trust property when the administrator uses it to secure his own debt to the pledgee.[3]

A guardian can not, however, bind his ward by a pledge of the ward's property. He has only a naked authority without title to such property. If a guardian needs to use his ward's property, the statute points out the way in which he may use it. If a guardian pledges a negotiable note payable to his order as guardian, the pledgee has notice from the note itself that it is trust property and he is charged with knowledge that the guardian had no right to pledge it.[4]

And so a trustee having a power to sell and reinvest, has no power to pledge even for the benefit of the trust estate, and certainly no power to pledge for his own benefit.[5]

§ 62. **A vendor in possession of property may pledge it,** though he is under contract to deliver it to a purchaser upon the payment of the purchase money. Upon the payment of the debt for which the pledge is made in such case, the pledgee

[1] Robertson v. Wilcox, 36 Conn. 426, 430, per Park, J.

[2] Carter v. Manufacturers' Nat. Bank, 71 Me. 448.

[3] See Chapter XII; Wilson v. Doster, 7 Ired. (N. C.) Eq. 231; Gray v. Armistead, 6 Ired. (N. C.) Eq. 74; Tyrrell v. Morris, 1 D. & B. (N. C.) Eq. 559, 560.

[4] Hardy v. Citizens' Nat. Bank, 61 N. H. 34.

[5] First Nat. Bank v. National Broadway Bank, 156 N. Y. 459, 51 N. E. Rep. 398, modifying 22 App. Div. 24. See §§ 474, 478.

is bound to deliver the property back to the pledgor; and he can not lawfully deliver the goods to any one else, as, for instance, to one who claims to be a purchaser from the pledgor, unless the latter so direct.[1] The pledgor is entitled to a return of the goods, and a delivery of them to any one else, though he has a contract for their purchase, may defeat the pledgor's rights, and deprive him of his security for the purchase money. Not only is the pledgee bound to return the goods to the pledgor, but he is equally bound to defend the interests of the latter in an action brought by a stranger to recover the property, when he is not entitled to the possession of it.[2]

§ 63. **A vendee in possession of chattels under a conditional sale** can not make a valid pledge of them, because he is not the owner until he has complied with the condition. But if the sale be subject to a statute, such as exists in several states, which requires contracts for conditional sales to be recorded in order to be valid against creditors and subsequent purchasers without notice, the vendee, holding possession under a contract of conditional sale not recorded, can convey a right by pledge superior to that of the vendor. Thus, a manufacturer in Pennsylvania leased a locomotive to a railroad corporation in Iowa, where such a statute was in force, by an instrument in writing not recorded, for a sum equal to its value, to be paid in nine months, whereupon a bill of sale should be executed; otherwise the manufacturer had the right to repossess the locomotive. The locomotive was taken to Iowa, and was there pledged by the railroad corporation as security for a loan. It was held that the pledgee's right was superior to that of the manufacturer.[3]

But the general rule of law, when not affected by statutory provisions, is, that while an agreement between the vendor and vendee of personal property that the title shall not pass until

[1] Dean v. Lawham, 7 Ore. 422; Lyle v. Barker, 5 Binn. (Pa.) 457.

[2] Pomeroy v. Smith, 17 Pick. (Mass.) 85; Dean v. Lawham, 7 Ore. 422.

[3] Pittsburg Locomotive & Car Works v. State Nat. Bank, 21 Int. Rev. Rec. 349.

the property is paid for, is legal and binding between the parties themselves, though possession of the property is delivered to the vendee; yet as to purchasers and creditors of the vendee such agreement is void, and as to them the property must be considered as belonging to the vendee in possession. And if the vendee in possession pledges the property to one who loans him money *bona fide*, without notice, the latter will acquire a valid and binding lien on the property for the payment of the money loaned, and he will be protected against the vendor's claim for the purchase money. A notice of defective title in the pledgor comes too late to affect the pledgee after he has advanced money secured by the pledge. To be operative, such notice should be prior to the payment of the money.[1]

§ 64. **A common carrier or other bailee of goods can not pledge them.**[2] Thus where carriers on their way purchased a boat in order to ascend a river to the place of destination of their goods, and deposited, as security for the boat, a portion of the goods, the owner was held to be entitled to recover against the pledgee.[3] A master of a ship may, however, hypothecate a portion of his cargo, when this is necessary to enable him to continue the voyage;[4] but in doing this he is regarded, under the general maritime law, as acting as an authorized agent over the cargo, and not in the capacity of a carrier. Moreover, to justify such hypothecation the necessity must be extremely clear. It must appear that the vessel was in a foreign port; that the voyage was unfinished; and that the pledge was indispensable to enable the ship to complete the voyage.[5]

[1] Mich. Cent. R. Co. v. Phillips, 60 Ill. 190; Western Union R. Co. v. Wagner, 65 Ill. 197; Ohio and Miss. R. Co. v. Kerr, 49 Ill. 458.

[2] Shafer v. Lacy, 121 Cal. 574, 54 Pac. Rep. 72; Cook v. Beal, 1 Bosw. 497.

[3] Kitchell v. Vanadar, 1 Blackf. (Ind.) 356, 12 Am. Dec. 249.

[4] Freeman v. East India Co., 1 Dow. & Ry. 234, 10 B. & Al. 617, 621, per Bayley, J.; The Gratitudine, 3 Rob. Adm. 240, 258; The Fortitude, 3 Sumn. 228; United Ins. Co. v. Scott, 1 Johns. (N. Y.) 106, 111.

[5] Marziou v. Pioche, 8 Cal. 522.

§ 65. **One joint owner of a chattel, though in possession of it, can not pledge the interest of his co-owner** without his consent, and the fact that the pledgee acts upon the supposition that he is acquiring a lien upon the entire interest does not avail to give him such a lien.[1] One joint owner of a chattel may, however, pledge his own interest without the consent of his co-owner, and if the pledgor had the right of possession the pledgee will take the same right of possession as against the other owner; and in such case the latter can not maintain replevin against the pledgee for the thing pledged; nor can both joint owners jointly maintain the action without paying the debt secured.[2]

One of two joint owners of a chattel, both being in possession, may pledge his share to the other joint owner, and he, by continuing in possession and control, has a valid pledge.[3]

§ 65a. **An agent having authority only to sell can not make a valid pledge.**[4] The board of directors of a manufacturing corporation authorized the issuing of coupon bonds secured by mortgage on its real estate "for the purpose of raising money to pay off the floating debts of the company," and an agent was authorized to negotiate the bonds at a price not less than par and accrued interest. Some of the bonds issued pursuant to the resolution were sold by the agent in precise accordance with such authority and the proceeds received by the corporation; others were pledged as collateral security for prior debts. The corporation became insolvent, the mortgage was foreclosed and the property sold. In proceedings to determine as to the

[1] Frans v. Young, 24 Iowa 375.

[2] Frans v. Young, 24 Iowa 375, Chief Justice Dillon delivering the decision and citing numerous authorities.

See Jones on Chattel Mortgages, §§ 47, 48.

[3] Thoms v. Southard, 2 Dana (Ky.) 475, 479, 26 Am. Dec. 467; Clark v. Costello, 79 Hun 588, 61 N. Y. St. Rep. 556, 29 N. Y. Supp. 937.

[4] Shaw v. Saranac Horse N. Co., 144 N. Y. 220, 39 N. E. Rep. 73, 78 Hun 7, 29 N. Y. Supp. 254; Cumming v. Williamson, 1 Sand. Ch. 17; Waldron v. McComb, 1 Hill 111; Bloomer v. Waldron, 3 Hill 361; Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; Merchants' Bank v. Livingston, 74 N. Y. 223.

application of the proceeds, it was held that the agent had no authority to pledge the bonds, but was bound to sell them for money, or at least so to dispose of them as to pay debts of the company, and, therefore, that the holders of the bonds so pledged were not entitled to share in the proceeds.[1]

III. *Pledges by Married Women.*

§ 66. **Married women, under the statutes now in force** in most of the states in regard to their property rights, can make contracts affecting their separate personal property as freely as single women can. The statutes of the several states are not the same, and do not confer the same powers of independent control; but generally they enable a married woman to hold and dispose of her personal property in the same manner as as if she were sole.[2] She may make a valid pledge of such property to secure a debt of her own, her husband's debt, or the debt of another person. She may pledge her stock in a corporation to secure such a debt, and may confer upon the pledgee a valid power of sale without notice upon a default in payment of the debt secured.[3] A certificate of shares standing in the name of a married woman is evidence of her absolute ownership of it; and in case there is nothing in it or connected with it indicating a trust in favor of another person, one loan-

[1] Shaw v. Saranac Horse N. Co., 144 N. Y. 220, 39 N. E. Rep. 73.

[2] Upon the general powers of married women at common law and by statute to charge their own property for their own debts, or the debts of others, see 1 Jones on Mortgages, §§ 106-118; Enochs v. Newton, 65 Miss. 86, 3 So. Rep. 141.

[3] Dando's App., 94 Pa. St. 76. In *Indiana*, however, it is provided by statute that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." R. S. 1894, § 6954. Whenever the result of a transaction is such as to impose upon the wife's property a liability to answer for the debt of another, she must be regarded as the surety and entitled to the protection of the statute, whether she be a party to any written contract or not. Whenever a married woman either pledges or mortgages her separate property to secure the debt of another, she occupies the position of a surety within the statute. Goff v. Hankins, 11 Ind. App. 456, 39 N. E. Rep. 294. See Shirk v. North, 138 Ind. 210, 37 N. E. Rep. 590.

ing money upon her pledge of the shares as security is warranted in making the loan upon the assumption of such ownership. He is not bound to inquire and ascertain how she obtained it.[1]

The validity of a pledge by a married woman of her separate personal property is governed by the law of the state of the husband's domicile. If by the law of such domicile, a married woman can not pledge her separate property for the debt of her husband, a pledge by her of corporate stock owned by her as security for his debt is void, though made in a state by the law of which such a pledge is valid.[2]

§ 66a. **A valid contract of pledge can not be made between husband and wife.** A husband gave to his wife jewelry to the value of six hundred dollars, and she afterwards delivered the jewelry to him in pledge for money advanced by him to her. Subsequently he obtained a divorce from her. In an action by a creditor against the woman, in which the former husband was summoned as trustee, he admitted that the jewelry belonged to his former wife, and set up a pledge of it to himself. It was held that the pledge was invalid, and that the trustee was properly charged.[3]

§ 67. **A married woman who has pledged, or allowed her husband to pledge, her separate property for his own benefit,** is entitled to have the pledge redeemed by him or out of his estate. If her husband become insane and his estate is ample, she may require his guardian to redeem her jewelry and other articles pawned to pay his personal expenses.[4]

A pledge of a married woman's personal property made by her husband without her authority is of course not binding

[1] Leitch v. Wells, 48 N. Y. 585.

[2] Union Nat. Bank v. Hartwell, 84 Ala. 379, 4 So. Rep. 156.

[3] Porter v. Wakefield, 146 Mass. 25, 14 N. E. Rep. 792.

[4] Harrall's Case, 31 N. J. Eq. 101.

upon her;[1] but such a pledge becomes effectual upon her subsequent ratification of it.[2]

If a married woman authorize her husband to pledge a chattel belonging to her, the presumption is that his authority was to pledge it in the usual manner of making pledges; and mere authority to raise money on the property does not authorize him to consent to a sale without notice upon default, or to consent to a sale in any manner except that specified by statute.[3]

If a married woman indorses a promissory note given by her husband to a bank for a loan to him, and pledges to the bank shares of stock owned by her as collateral security for the note, the fact that she subsequently indorsed other notes of her husband discounted at the same bank, without demanding the delivery to her of the certificate of stock, does not show an agreement on her part that the stock should be security for the general indebtedness of her husband to the bank. It is competent for her to show, upon a bill in equity to redeem the stock, that her husband had no express authority to write upon another note, given by him to the bank for the amount to which his account had been overdrawn, a statement that the stock is collateral security for that note also, and that the transaction was without her knowledge; and it is also competent for her to show that she never knew that he had overdrawn his account.[4]

The wife of a debtor has no implied authority, in his absence, to pledge any property of his for the payment of his debt.[5]

§ 68. **A married woman may pledge a policy of insurance for her benefit upon the life of her husband** as security for a debt of his.[6] It has been objected that such a policy can not be

[1] Knight v. Beckwith Commercial Co., 6 Wyo. 500, 46 Pac. Rep. 1094.

[2] Merrill v. Parker, 112 Mass. 250.

[3] Van Arsdale v. Joiner, 44 Ga. 173.

[4] Riley v. Hampshire County Nat. Bank, 164 Mass. 482, 41 N. E. Rep. 679.

[5] Swett v. Brown, 5 Pick. (Mass.) 178.

[6] Collins v. Dawley, 4 Colo. 138, 34 Am. Rep. 72; Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398.

transferred by a married woman, even with the consent of her husband, because the fund itself, not being payable in the life-time of the husband, is a reversionary interest belonging to the wife, which can not be lawfully transferred by the husband and wife so as to bar her right of survivorship. But the principle involved in this objection has no application, where the reversionary interest secured to the wife is her sole and separate property; and therefore her assignment of such a policy, as collateral security for her husband's indebtedness, is valid.[1]

IV. *Pledges by Partners.*

§ 69. **One member of a copartnership may make a valid pledge of a chose in action,** or other property of the firm, to secure a partnership debt.[2] A sole surviving partner may also transfer in pledge a chose in action, or other personal property of the partnership, to secure a partnership debt, and the pledge, if made in good faith, will be effectual against other creditors of the partnership, as well as against the representatives of the deceased partner.[3]

A partner intrusted with winding up the business of his firm, and authorized to trade any part of the assets, and to do all and everything he might deem expedient for settling its affairs, may pledge notes belonging to the firm, to secure not only a loan obtained to meet a partnership liability, but also a prior indebtedness of the firm to the same creditor.[4]

But under the Code of Louisiana[5] a partner can not for his own concerns give in pledge the partnership property without the consent of his associates. He can not do it even for the partnership concerns without such consent, unless he be vested with the management of the copartnership. This rule admits of exception in matters of commercial partnership.

[1] De Ronge v. Elliott, 23 N. J. Eq. 486. And see Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419, 4 Am. Dec. 328.

[2] Galway v. Fullerton, 17 N. J. Eq. 389. See Jones on Chattel Mortgages, §§ 45, 46.

[3] Bohler v. Tappan, 1 Fed. Rep. 469.

[4] Smith v. Dennison, 101 Ill. 531.

[5] R. Civil Code 1900, art. 3151.

V. *Pledges by Corporations.*

§ 70. **As a general rule a corporation has the power to pledge any chattel belonging to it,** unless expressly restrained by statute, or impliedly restrained by the nature of its undertaking. A corporation has at least the same power to pledge its property that it has to mortgage it; and this power is unlimited, except in case of corporations which have been given special rights and privileges, from the exercise of which it is expected the public will derive an advantage. Railroad corporations are of this nature. Accordingly it is held that such corporations can not, without legislative authority, mortgage their corporate franchises, or property which is essential to the exercise of such franchises.[1] This restriction upon the right of alienation by such companies applies with much more force to transfers by way of mortgage than to transfers by way of pledge; for there is but little property essential to maintaining the business of such a corporation which could be delivered by way of pledge. So far as concerns a pledge of the rolling-stock of a railroad corporation, the same considerations would apply that are applicable to mortgages of such rolling-stock.[2]

§ 71. **A corporation may pledge its unissued stock or bonds** which have been left in the hands of its directors to be applied to the advancement of its best interests. The directors have in such case the right to determine how it can be most advantageously used, and it is no proper subject of complaint on the part of any one that they apply it to raising money for the company.[3]

[1] Jones on Corporate Bonds and Mortgages, §§ 1-25; Jones on Mortgages, § 124.

[2] See Jones on Corporate Bonds and Mortgages, §§ 122-168.

[3] Combination Trust Co. v. Weed, 2 Fed. Rep. 24. In Morris Canal & Banking Co. v. Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423, and in Third Nat. Bank v. Eastern R. Co., 122 Mass. 240, 243, it seems to have been doubted whether a debtor's own obligation could be held in pledge for his debt. But there can be no question now that such a pledge can be made; and, as a matter of fact, such pledges are very frequent. Since this was written this doubt has been removed by the decisions in Union Cattle Co. v. International Trust Co., 149 Mass. 492, 501, 21 N. E. Rep. 962, citing text; Costelo v. Crowell, 134 Mass. 280.

A transaction whereby directors, in good faith and in the belief that the corporation was solvent, made a loan to it and accepted an assignment of securities from it as collateral, pursuant to a plan to relieve it of its financial difficulties, is not contrary to public policy, and is valid, although the corporation was, in fact, insolvent at the time the loan was made.[1]

Upon the payment of a debt of a corporation secured by a pledge of its own bonds, and the surrender of the bonds to an officer of the corporation, they are not property of the corporation liable to be reached by garnishment against the officer;[2] for upon the payment of the debt the bonds, which were merely the corporation's own collateral promises, were discharged. The obligation of the corporation, as witnessed by its bonds, is discharged by payment as much as the corporation's note is discharged by the same payment.

§ 72. **A corporation may, moreover, pledge its unissued stock, or negotiable bonds, to its president or to one of its directors,** as security for a loan; and although the transaction will be looked upon with suspicion, it will be enforced when it is shown to have been made for the benefit of the corporation, and to be just.[3] Although a director stands in a fiduciary

[1] Converse v. Sharpe, 161 N. Y. 571, 56 N. E. Rep. 69, 37 App. Div. 399, affirmed; Duncomb v. New York, H. & N. R. Co., 88 N. Y. 1; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Sandford Fork and Tool Co. v. Howe, 157 U. S. 312, 15 S. C. Rep. 621.

[2] Galena & Southern Wis. R. Co. v. Stahl, 103 Ill. 67. In this case, however, the bonds were not actually in the officer's hands, though he had receipted for them. The creditor had proved them before a master appointed in foreclosure proceedings, and had left the bonds in the master's hands. The receipt by the officer was a mere formality to free the creditor from his obligation to return the bonds. But aside from this circumstance, the principle stated in the text seems to be good law, and to be supported by the reasoning of the court.

[3] Combination Trust Co. v. Weed, 2 Fed. Rep. 24; Kinsman v. Fisk, 83 Hun 494, 65 N. Y. St. Rep. 75, 31 N. Y. Supp. 1045. In Chouteau v. Allen, 70 Mo. 290, 338, where the directors of a corporation pledged a large amount of its assets to themselves, the court, by Sherwood, C. J., said: "Even if the order by which the officers and directors of the company pledged to each other nearly a million dollars in bonds to secure an indebtedness of less than four per cent. of the face of the collaterals, can

relation to the corporation, and is within the rule disenabling one intrusted with powers to be exercised for the benefit of others from dealing in his own behalf, in respect to matters involving the trust, yet such a transaction can not be avoided by the corporation without restoring what it has received; and it is immaterial in this respect whether the pledge was taken for a present or a precedent debt.[1] A director receiving bonds or other property of a corporation, as collateral security for a debt honestly due him, is not within the rule.[2] "Where the trustee's act consists, not in possessing himself of the property of the beneficiary as owner, but in taking collateral security for a debt honestly due him, or a liability justly incurred, the rule can have no application, since the payment of the debt, or the discharge of the liability, is an essential prerequisite of the avoidance."[3]

§ 73. **A manufacturing or commercial corporation may pledge its mortgage bonds** as collateral security for existing debts, and this power is not limited or restrained by a resolution of its stockholders authorizing the use of the bonds in payment, at par value, of any indebtedness of the company, or to raise money for conducting its business. One of the implied powers of such a corporation is to deal on credit, for any proper corporate purpose, in the usual and ordinary mode of conducting

be imagined, considering the great disproportion between the amount of the debt and the value of the pledge, to have been made *bona fide*, still the fact that the pledge was made in favor of themselves, by the fiduciaries of the company's interests, is enough to cause the order to be scrutinized with the most rigorous and jealous observation. A transaction of this kind is viewed with greater odium than a dealing between a trustee and his beneficiary."

[1] Duncomb v. New York, Housatonic, & Northern R. Co., 84 N. Y. 190.

[2] Creighton v. Scranton Manuf. Co., 191 Pa. St. 231, 43 Atl. Rep. 134; Finch Manufac. Co. v. Stirling Co., 187 Pa. St. 596, 41 Atl. Rep. 294; Cowan v. Pennsylvania Plate Glass Co., 184 Pa. St. 1, 38 Atl. Rep. 1075.

[3] Duncomb v. N. Y., Housatonic & Northern R. Co., 84 N. Y. 190. "To cling to the fruits of the trustee's dealing while seeking to avoid his act; to take the benefit of his loan, and yet avoid and reverse its security, would be grossly inequitable and unjust. It would turn a rule designed as a protection into a weapon of offense and injustice." Per Finch, J.

its business. Such bonds, whether hypothecated as a security for antecedent debts or applied directly to their satisfaction, are used in paying the debts, for the benefit of the corporation, and for the objects specified in the resolution.[1]

Such a corporation may in like manner pledge any chose in action, though not negotiable. When it has empowered its president to pledge a contract, under which money is due, as collateral security for money borrowed, it can not claim that the terms of the pledge made by the president are in excess of the authority conferred on him, when at the time of the pledge it was cognizant of all the facts concerning the pledge, and received the money borrowed, and gave no sign of repudiating the transaction.[2]

§ 74. **A railroad corporation** having power to borrow money for completing or operating its road, and to issue its bonds to secure the payment of any debt contracted for that purpose, may make a valid pledge of its bonds, not only for money borrowed at the time, but also for a precedent debt incurred for money borrowed for the purposes specified, unless some statute requires that the borrowing and issuing of the bonds shall be simultaneous.[3] Such a corporation may make a valid pledge of its bonds to its president to secure a sum of money fairly due him upon his salary. It may also make a valid pledge of its bonds to secure the rent of offices used in its business; for such an expenditure is embraced within the authority conferred upon it to issue its bonds.[4]

VI. *Pledges to Corporations.*

§ 75. **A corporation, whether private or municipal, may take a pledge of any property,** unless the pledge come within some positive statutory prohibition. A pledge to a corporation

[1] Lehman v. Tallassee Manuf. Co., 64 Ala. 567.

[2] McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. Rep. 217, 31 C. C. A. 487.

[3] Duncomb v. N. Y., Housatonic & Northern R. Co., 84 N. Y. 190.

[4] Duncomb v. N. Y., Housatonic & Northern R. Co., 84 N. Y. 190.

which is prohibited from doing a banking business may be enforced, though the transaction was a discount of a note secured by pledge. The note may be void, but the loan and the security are valid.[1]

A provision of statute that no director of a savings bank shall borrow its funds, and that upon so doing his office shall become vacant, can not be availed of to defeat a pledge made by such director for money borrowed from the bank, especially after the transaction is executed. The violation of the provision can only be availed of by the sovereign power. The bank may sue to recover the money loaned, and can hold the pledged stock, or its proceeds in a suit for the recovery of the same, until the money lent on faith of the pledge is repaid.[2]

§ 76. **A corporation prohibited by statute from becoming the holder of the stock of another corporation** can not take a pledge of the stock of such other corporation from one of its stockholders. If it attempt to do so, the corporation whose stock is sought to be pledged, by refusing to transfer the stock upon its books, does not make itself liable to the pledgee for such refusal, because the pledgee, in such case, is not entitled to a transfer.[3] Though a corporation take in pledge security which

[1] Duncomb v. N. Y., Housatonic & Northern R. Co., 84 N. Y. 190.

[2] Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. Rep. 84; Savings Bank v. Burns, 104 Cal. 473, 38 Pac. Rep. 102. And see Jones v. Guaranty and Indemnity Co., 101 U. S. 622, 628; National Bank v. Matthews, 98 U. S. 621.

[3] Franklin Bank v. Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594. Such a statutory prohibition is founded upon the reason that if one corporation could acquire the stock of another, it might obtain a controlling interest in the stock of that corporation, and thus not only interfere with the internal management of the affairs of that corporation, but enlarge its own franchise by engaging in business foreign to that for which it was organized. In the above case there is a *dictum* of the court that "there would seem to be little doubt, either upon principle or authority, and independently of express statutory prohibition of the same, that one corporation can not become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute." The same view was expressed by the Supreme Court of Maine in the case of Franklin Company v. Lewiston Inst. for Savings, 68 Me. 43, 28 Am. Rep. 9, where other cases to the same effect are cited.

it is prohibited by its charter from holding, the contract of pledge is not void, but, at most, only voidable. The title to the security vests in the corporation as pledgee.[1]

§ 77. **A national bank may take a pledge** of chattels as security for a loan of money. The authority conferred by the banking act to make loans on personal security does not restrict them to the security afforded by the names of indorsers or personal sureties, but they may take pledges of bonds, choses in action, bills of lading, or other personal chattels; and this is the universal usage.[2] The words "personal security" seem to be used in contradistinction to real estate security.

A pledge to a national bank is valid although taken in violation of a provision of the National Banking Act, prohibiting a loan to one individual exceeding one tenth part of the capital of the bank. The penalty for such a violation of the law consists in proceedings against the franchise of the bank, and a liability for damages of its offending officers.[3]

A national bank may hold in pledge, as collateral security for a loan made, or to be made, shares in the capital stock of another national bank.[4]

A national bank has no authority to lend its credit on personal security; and therefore one who knowingly takes as collateral security drafts of a national bank drawn for the accommodation of a customer, can not recover in a suit against the bank in the hands of a receiver.[5]

§ 78. **National banks may take a pledge of the stock of corporations whose property is solely real estate,** without violating the provisions of the National Banking Act, under which

[1] Sestare v. Best, 88 N. Y. 527.

[2] Pittsburg Locomotive and Car Works v. State Nat. Bank, 21 Int. Rev. Record 349; Shoemaker v. National Mechanics' Bank, 2 Abb. (U. S.) 416.

[3] Gold Mining Co. v. Nat. Bank, 96 U. S. 640; Duncomb v. New York, Housatonic and Northern R. Co. 84 N. Y. 190.

[4] National Bank v. Case, 99 U. S. 628; Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 208, 215.

[5] Johnston v. Charlottesville Nat. Bank, 3 Hughes 657; and see Seligman v. Charlottesville Nat. Bank, 3 Hughes 647.

it is held that such banks can not loan money upon mortgages of real estate, if such mortgages are taken as security for loans made at the time, or for future advances;[1] for a pledge of stock of such corporations is in no sense a mortgage of the corporate property.[2] The stock of such corporations is personal property.

§ 79. **A national bank can not make a valid loan on the security of its own stock.**[3] It can not become a holder in any way of its own shares, unless this is absolutely necessary to prevent a loss on a debt previously contracted.[4] It can not acquire a lien on its own stock held by persons who are not debtors, even by force of direct by-laws, or articles of association framed for that purpose. Such a lien is against the spirit and policy of the statute, and a bank has no right to make a by-law giving such a lien.[5]

[1] Jones on Mortgages, § 134.
[2] Baldwin v. Canfield, 26 Minn. 43, 1 N. W. Rep. 261, 585.
[3] Act of June 3, 1864.
[4] Bank v. Lanier, 11 Wall. 369; Hagar v. Union Nat. Bank, 63 Me. 509.
[5] Bullard v. Bank, 18 Wall. 589.

CHAPTER III.

PLEDGES OF NEGOTIABLE PAPER.

I. *Delivery and Possession.*

§ 80. **Delivery and possession are essential to a valid pledge of negotiable paper,** in the same way that they are essential to a valid pledge of a corporeal chattel. In a recent case before the supreme court which arose in Louisiana, and was governed by its code, it was held that a pledge of negotiable paper without an actual transfer or delivery of it to the pledgee, it never having been out of the pledgor's actual possession, but always subject to his disposal by way of collection, sale, substitution, or exchange, was not valid as against the pledgor's creditors.[1] A bank of New Orleans, organized under the National Banking Act, obtained a loan of a million francs from the Credit Mobilier of Paris, upon an agreement to deposit bills and notes with the president of the bank and his partner, Cavaroc & Son. Certain securities were selected and placed in an envelope and handed to the president, for Cavaroc & Son. He handed them to the cashier of the bank for safe keeping. Soon afterwards the securities were handed to the discount clerk, for the purpose of his conveniently attending to their collection and renewal. When any of the notes were paid, the money was

[1] Casey v. Cavaroc, 96 U. S. 467; followed in Casey v. National Bank, 96 U. S. 492; Casey v. Schuchardt, 96 U. S. 494; Hook v. Ayers, 80 Fed. Rep. 978; Seymour v. Hendee, 54 Fed. Rep. 563; Jacquet v. Creditors, 38 La. Ann. 863; Conger v. New Orleans, 32 La. Ann. 1250; D'Meza's Succession, 26 La. Ann. 35; Atkinson v. Foster, 134 Ill. 473, 25 N. E. Rep. 528.

taken and used by the bank, and other notes were substituted in their place. Many of the notes were exchanged, because more available to the bank in some other transaction. So far as those with whom the bank dealt could perceive, the bank continued to have possession and control of all the securities in its own right, and they all appeared to be equally liable with the other assets to the claims of all the creditors. It was held that there was not such a delivery and possession as is necessary to create a pledge by the law of Louisiana.

Aside from being governed by the law of Louisiana, the case was distinguished from that of Clark v. Iselin,[1] in that the securities in the Louisiana case never went out of the pledgor's actual possession, nor were the bills and notes indorsed by the bank to the pledgee. But in Clark v. Iselin the title was transferred to the pledgee, so that he held the paper by way of mortgage as well as pledge; and hence the actual possession of the securities was of less importance. A mortgage may be valid notwithstanding the mortgagor has possession. In Casey v. Cavaroc, Mr. Justice Bradley, upon this point, said: "It must not be overlooked that the Credit Mobilier has no other claim to the securities in question but that of pledge. A pledge, and possession, which is its essential ingredient, must be made out, or their privilege fails. An agreement for a pledge raises no privilege. There is no mortgage; for the title to the securities was never transferred to them. The evidence of the cashier is, that they were all stamped payable to the order of the bank, when discounted. They were not indorsed by the cashier until the day they were removed by Cavaroc, which was after the bank had failed."

The trustees of an estate deposited for safe keeping certain railroad bonds in a bank of which one of the trustees was cashier. Without the knowledge of the president or any director of the bank the cashier took from the bank a sum of money for which he made to the bank his own note which purported to deposit as collateral security for the payment of

[1] 21 Wall. 360.

the note the railroad bonds so deposited for safe keeping. The transaction did not appear in any form upon the books of the bank. After the death of the cashier the note was found, but the bonds did not accompany it. They were found in a separate envelope marked with the cashier's name, and the name of the estate to which they belonged was written on the bonds in the cashier's hand. It did not appear that the president of the bank or either of the directors had ever had any knowledge of the note or the bonds in the cashier's life-time. It was held that the surviving trustee was entitled to recover the bonds from the bank, there being no evidence that they had actually been delivered to the bank. The cashier's possession was the possession of the trustees, and not of the bank, as the bonds remained under his personal control. "It required an actual delivery, or the passing of the property from the hands of the cashier to the possession of the bank to vest the title in the latter. The bank did not accept them or know of the promise to pledge them."[1]

§ 81. **There are statutory provisions upon this subject in a few states.** Thus in Georgia[2] it is provided that promissory notes and evidences of debt may be delivered in pledge. The receiver in pledge or pawn of promissory notes is such a *bona fide* holder as will protect him, under the same circumstances as a purchaser, from the equities between the parties, but not from the true owner, if fraudulently transferred, though without notice to him.

The Civil Code of Louisiana[3] provides that when a debtor wishes to pawn a claim on another person, he must make a transfer of it in the act of pledge, and deliver to the creditor to whom it is transferred the note or instrument which proves its existence, if it be under private signature, and must indorse it if it be negotiable.

[1] Fisher v. National Bank, 48 N. J. Law 390, 4 Atl. Rep. 444.

[2] Code 1873, § 2139. But the delivery of title deeds creates no pledge.

[3] R. Civil Code 1900, arts. 3156, 3158, 3160, 3161; Fluker v. Bullard, 2 La. Ann. 338.

When a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations or claims upon other persons, he shall deliver to the creditors the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgors thereof if made in good faith.

When the thing given in pledge consists of a credit not negotiable, it is necessary, not only that the proof of the pledge be made by an authentic act or by act under private signature duly recorded, but that a copy of this act shall have been duly served on the debtor of the credit given in pledge. On the other hand, this notification of the act of pledge to the person owing the debt pledged shall not be necessary, if the debt is evidenced by a note or other instrument payable to the bearer or to order; because in that case it will suffice that the note or instrument shall have been indorsed by the person pledging it, to invest the creditor with the privilege above mentioned.

§ 82. **Parol evidence is admissible to establish the fact that a transfer of negotiable paper was intended simply as collateral security,** and not as an absolute transfer.[1] Such evidence is admissible for this purpose upon the same grounds that it is admissible to show that an absolute conveyance of real or personal property was intended to operate only as a mortgage.[2]

It is always competent to show by parol that one to whom negotiable paper has been made or transferred in terms absolutely in fact holds it as security only.[3]

§ 83. **Yet the delivery need not always be actual.** A delivery is sufficient, which vests the title and control of the paper

[1] Stevens v. Wiley, 165 Mass. 402, 406, 43 N. E. Rep. 177; Minchin v. Minchin, 157 Mass. 265, 32 N. E. Rep. 164; Leighton v. Bowen, 75 Me. 504; Hazzard v. Duke, 64 Ind. 220; Wood v. Matthews, 73 Mo. 477; Johnson v. Huston, 17 Mo. 58; Sayre v. King, 17 W. Va. 562. See §§ 36, 37.

[2] Jones on Mortgages, §§ 282–342; Jones on Chattel Mortgages, §§ 22–24.

[3] Kelly v. Ferguson, 46 How. (N.Y.) Pr. 411; Van Pelt v. Otter, 2 Sweeny (N. Y.) 202.

in the pledgee. Whenever, from the circumstances of the case, an actual delivery is impossible, the pledge may rest upon the contract of the parties, accompanied by the possession of a third person. Thus, a note already pledged and in the possession of the pledgee may be again pledged by the owner to another person, subject to the lien of the first pledge, without any further delivery of it. The possession of the note by the first pledgee may be regarded as the possession of the second pledgee through the agency of the former.[1]

A note of a third person, already in the hands of a creditor, to secure a particular debt, may, after the payment of that debt, or subject to the payment of that, be pledged to the same creditor for another debt, without a new delivery.[2]

§ 83a. **A valid delivery of promissory notes as pledges may be made by separating them from other like notes, placing them in a package with a memorandum of the terms of the pledge**, pointing them out to the pledgee and securing her assent to the transaction, delivering them to her husband in her presence as her agent, although he was also one of the pledgors, and then placing them in the hands of an employe of the pledgors, with instructions as to their care assented to by the pledgee, one of which instructions was to keep them in a bank vault to which the pledgors had access. The supreme court of Kansas, rendering this decision, after distinguishing the case from that of Casey v. Cavaroc,[3] say: "Nearly all the authorities are to the effect that, if the pledgee receives manual possession of the pledge, its return to the pledgor as special bailee or agent may be made without impairing the validity of the contract or pledge.[4] Had the pledgee taken the pledges into her hands with intent to possess and keep them, and the next moment returned them to her husband or any other member of the firm to care for them as her agent, the requirements of

[1] *In re* Wiley, 4 Biss. 171; Brown v. Warren, 43 N. H. 430; Van Blarcum v. Broadway Bank, 37 N. Y. 540.

[2] Providence Thread Co. v. Aldrich, 12 R. I. 77, 6 Rep. 347.

[3] 96 U. S. 467.

[4] Citing Jones on Pledges, §§ 40–44

the law would have been satisfied. They were equally satisfied by the act of the pledgors, the firm, in pointing out the pledged property to her, with explanation of the right to it which they had conferred upon her, and obtaining her assent to the transaction."[1]

A delivery to a third person for the pledgee's benefit, with his consent, is sufficient.[2]

§ 84. **Subsequent delivery.** A valid transfer of negotiable paper may be made by a written assignment, without a delivery of it at the time. Thus, if a loan be made upon such paper at the time of such assignment, and the paper be delivered afterwards, the creditor is a *bona fide* holder for value, and is not affected by any set-off which may accrue to the maker of the collateral paper between the time of the assignment and the actual delivery of it.[3] An agreement by the holder of a promissory note to pay a portion of it to a creditor when collected amounts to an equitable transfer of such portion of the note, which is good against the pledgor's assignee in insolvency.

§ 85. **Actual possession of negotiable paper is requisite to establish the title of a bona fide holder** as against the equities of third persons. Thus, if one loan money upon negotiable paper which the borrower has not received, upon the strength of a letter or other writing from the maker or holder of such paper to the borrower, promising to forward it, the lender takes the risk of equities arising in favor of the maker or holder of the paper, whereby he is absolved from his promise to deliver it. A banker at Havana, at the request of a merchant in New York, drew bills of exchange on London upon his own credit,

[1] Matthewson v. Caldwell, 59 Kan. 126, 134, 52 Pac. Rep. 104, per Doster, C. J. See Lanaux's Succession, 46 La. Ann. 1036, 15 So. Rep. 708.

[2] This is provided for by statute in some states, § 34, and such delivery is abundantly supported by the decisions. Gibson v. Lenhart, 111 Pa. St. 624, 5 Atl. Rep. 52; Boynton v. Payson, 67 Me. 587; Cahn v. Ford, 42 La. Ann. 965, 8 So. Rep. 477; City Bank v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332.

[3] §§ 38, 39; Portalis v. Tetley, L. R. 5 Eq. 140; Nelson v. Edwards, 40 Barb. (N. Y.) 279, 5 Bosw. 178.

[4] Gallinger v. Pomeroy, 3 Greene (Iowa) 178, 54 Am. Dec. 496.

and sold the same at Havana, invested the proceeds, which were his own funds, in current bills on New York, payable to the merchant's clerk, and forwarded them in a package directed to the merchant, by the purser of a steamer, to be deposited in the post-office in New York. The banker telegraphed to the merchant, stating the transaction in substance, and that the bills purchased had been forwarded by steamer. The merchant applied for a loan upon these bills, exhibiting the telegram, and obtained the loan upon delivering the telegram, with an agreement on his own part to hand over the bills upon their arrival. The next day the merchant failed, and the banker, learning of the failure before the delivery of the bills, commenced an action to recover them, and obtained an order restraining the postmaster of New York and the merchant from transferring or disposing of the bills. The Court of Appeals of New York held that the lender could not claim the bills as *bona fide* holder, but acquired only the rights of the merchant in the bills; and that the banker was not estopped by his telegram from asserting his right to reclaim the bills.[1] Upon the latter point the court say: "An insuperable difficulty in predicating an estoppel *in pais* against the plaintiff upon this dispatch is, that it was designed solely for the information of the persons to whom it was addressed, and not to influence the action of any other person; and the communication was not of a character which could, in the usual course of business, influence the action of third persons; and least of all was it calculated to induce any one to part with money upon the credit of the bills referred to, and faith in the title of the borrower to them. The plaintiff could not have foreseen that the dispatch would be used as the basis of a credit, or that money could be borrowed on the faith of it. Every element of an estoppel was wanting. A party is only concluded; that is, estopped, from alleging the truth by a declaration or representation inconsistent with the facts asserted and attempted to be proved, when it is made with intent, or is calculated or

[1] Muller v. Pondir, 55 N. Y. 325, 14 Am. Rep. 259, affirming 6 Lans. 472.

may be reasonably expected to influence the conduct of another in a manner in which he will be prejudiced if the party making the statement is allowed to retract, and when it has influenced and induced action from which injury and loss will accrue if a retraction is allowed. There is no statement in the cable dispatch which is inconsistent with the rights now asserted by the plaintiff; and the assertion of such rights is not against good conscience in any view of the dispatch, or the use designed or expected to be made of it, or which was actually made of it. The plaintiff is not, therefore, estopped from asserting any right he may have to the bills in controversy.

"Neither does the rule invoked by the lender, that when one of two innocent persons must suffer from the wrongful or fraudulent act of another, the loss should devolve upon him by whose act or omission the wrong-doer has been enabled to perpetrate the fraud, avail him. That applies only when the wrong-doer is invested by the party sought to be charged with the ordinary *indicia* of ownership and *jus disponendi* of property, or an apparent authority to do the act from which loss must accrue to one of two innocent parties. The evidence of ownership of negotiable bills is their possession, properly indorsed, so as to pass the title to the holder. There is no such thing as a symbolical delivery of negotiable instruments; and the law does not recognize, for commercial purposes, a right of possession as distinct from the actual possession. Had the borrower himself had actual possession of the bills, and then indorsed and transferred them to the lender, the plaintiff would have been remediless. This is not only the legal evidence of ownership, but it is that required in dealing in commercial paper in the ordinary course of business; and he who acts with less evidence of title in one claiming to have the right of disposal does so at his peril."

As to the rights of the banker against the merchant in this case, it was held that he had the same right to stop the bills *in transitu* that one selling goods on credit has to stop them *in transitu*. This right, in both cases, continues so long as there has been no change in the possession and title.

§ 86. **Redelivery to debtor for collection.** The well-established principle that possession is necessary to perfect a title by pledge applies to pledges of negotiable paper and other choses in action, as well as to pledges of chattels; and it is also well settled, in regard to pledges of both kinds of property, that the delivery back of the possession of the thing pledged, by the act or with the consent of the pledgee, terminates his title, unless such redelivery be for a temporary purpose only; or unless the thing is to be held by the pledgor in a new character, such as a special bailee, or agent.[1] The qualification that there may be a redelivery of the thing pledged for a temporary purpose is applied to pledges of choses in action, in order to facilitate their collection through the services of the pledgor; and, accordingly, it is held that a creditor to whom negotiable paper, or any other chose in action, had been transferred as collateral security, may hand it back to the debtor, to enable him to collect the claim or to replace it by other security, without affecting the creditor's title.[2] The deposit is regarded as made merely to facilitate collections; and the money collected by the debtor is regarded as held by him in a fiduciary capacity for the pledgee. The fact that a portion of the collaterals is replaced by others within a month prior to the bankruptcy of the debtor has been held not to avoid the transaction, it appearing that the debtor's estate was not thereby impaired, and that there was no purpose to delay or defraud his creditors or to give preference to any one.[3]

A customer of a bank, having deposited with it as collateral security for discounts notes of a third person secured by mortgage, was allowed to withdraw them for the purpose of

[1] Citizens' National Bank v. Hooper, 47 Md. 88. See §§ 40-44.

[2] Clark v. Iselin, 21 Wall. 360; Hurst v. Coley, 15 Fed. Rep. 645; White v. Platt, 5 Denio (N. Y.) 269; Yates Co. Nat. Bank v. Baldwin, 43 Hun 136; First Nat. Bank v. Adam, 138 Ill. 483, 28 N. E. Rep. 955; Whipple v. Blackington, 97 Mass. 476; National Bank v. Jennings, 38 S. C. 372, 17 S. E. Rep. 16.

[3] Clark v. Iselin, 21 Wall. 360; White v. Platt, 5 Denio (N. Y.) 269. Compare with Casey v. Cavaroc, 96 U. S. 467. In the latter case the title to the paper was not in the pledgee by indorsement, whereas in the former cases the pledgee had such title.

foreclosure upon his agreement to return the proceeds, or to replace them by other securities. At the foreclosure sale, the customer purchased the property and deposited the deed with the bank. Under these circumstances, an equitable lien would, doubtless, have been established in behalf of the bank, except for the reason that the indebtedness of the customer, for which the deposit was made, had in the meantime been discharged.[1] In another case coupons convertible into lands were held by a bank as security for a debt. The debtor, with the consent of the bank, converted the coupons into lands, which he selected, and a deed of which he took in his own name, and without recording it, deposited it with the bank. It was held that the bank had a good equitable lien upon the land as against a judgment creditor of the debtor.[2]

§ 87. **But a redelivery to the debtor destroys the creditor's special property in the pledge as against third persons** who in good faith deal with the debtor, relying upon his ownership of the property as evidenced by his possession of it. The holder of certain notes secured by mortgage deposited them in a bank of which he was a director, in a package with other securities, under an agreement that they were all to be held as collateral security for his liability to the bank. He was accustomed to add securities to this package, and to take securities from it, with the consent of the officers of the bank. With such consent he took away the mortgage notes, and assigned them, with the mortgage, to one who paid their full value. The assignee requested the assignor to take charge of the notes, and he accordingly did so, and placed them again in his package at the bank, and collected the interest as the assignee's agent. The mortgage was never in the bank. After the assignment of the mortgage, and after the assignor had again placed the notes in the package, the bank, relying upon the package of securities, loaned him a further sum. The package then contained other securities, including some bonds,

[1] Biebinger v. Continental Bank, 99 U. S. 143, per Miller, J.

[2] First Nat. Bank v. Caldwell, 4 Dill. 314.

which were worth more than the amount of the loan; but the officers of the bank afterwards allowed him to take away the bonds and dispose of them for his own benefit. The officers had no actual knowledge of the return of the notes to the package when they made this additional loan. The pledgor acted in good faith in selling the mortgage, believing his debt to the bank to be much less than the value of his other securities deposited there, and having forgotten his agreement with the bank. The purchaser of the mortgage had no knowledge of the agreement. It was held that these facts warranted a finding that the bank did not hold the notes as collateral security after they were taken away and again returned to it, and that the bank did not rely upon them in making the loan.[1]

§ 88. **Upon a redelivery for a temporary purpose the debtor is estopped by his contract to say that the creditor has thereby lost his property** in the security redelivered. Even if the debtor collect a note so redelivered to him, he will hold the money collected in trust for his creditor, so that his discharge in bankruptcy will not extinguish his liability to his creditor so incurred. The creditor may sue for the money so collected in an action for money had and received, as for a new cause of action distinguished from the original debt.[2] A creditor's special property in a note pledged to him is not lost by his returning the note to his debtor upon the agreement of the latter to return it or another note; and upon the refusal of the debtor to fulfill the agreement, the creditor may maintain against him an action for the conversion of the note.[3] But the court expressly state that no inference is to be drawn from this decision that the creditor could maintain trover against a third person to whom the debtor might have transferred the note after receiving it from the creditor.[4]

[1] Wyeth v. Nat. Market Bank, 132 Mass. 597. And see Citizens' Nat. Bank v. Hooper, 47 Md. 88.

[2] White v. Platt, 5 Denio (N. Y.) 269.

[3] Way v. Davidson, 12 Gray (Mass.) 465, 74 Am. Dec. 604. See § 44.

[4] Citing Bodenhammer v. Newsom, 5 Jones (N. C.) 107, 69 Am. Dec. 775, where it was held that a creditor,

In all the cases holding that a creditor, by delivery back of the pledged security for collection or exchange, does not lose special property in it, the action was against the debtor himself, or his assignee in bankruptcy, who took only the debtor's rights.

II. *Bona Fide Holder for Value.*

§ 89. **One taking negotiable paper before maturity as collateral security is, for all practical purposes, the owner of it,** and a *bona fide* holder for value, and may collect it, at least to the extent of the debt for which it was pledged, without regard to the equities between the original parties, whether arising out of the original transaction or from subsequent dealings.[1] Thus,

holding a horse in pledge and allowing his debtor to drive the horse a few miles to visit a relative, could not maintain trover for the horse against one who purchased it of the debtor.

[1] Swift v. Tyson, 16 Pet. 1; Railroad Co. v. National Bank, 102 U. S. 14; Claflin v. South Carolina R. Co., 8 Fed. Rep. 118; Irwin v. Bailey, 8 Biss. 523, 11 Chic. L. N. 376; Allen v. King, 4 McLean 128. *Alabama:* Miller v. Boykin, 70 Ala. 469; Morton v. New Orleans & Selma R. Co., 79 Ala. 590, 621. *Arkansas:* Brown v. Callaway, 41 Ark. 418. *Georgia:* Partridge v. Williams, 72 Ga. 807; Bealle v. Southern Bank, 57 Ga. 274; Bonaud v. Genesi, 42 Ga. 639; Exchange Bank v. Butner, 60 Ga. 654. *Iowa:* Sears v. Lantz, 47 Iowa 658; Des Moines Nat. Bank v. Chisholm, 71 Iowa 675, 33 N. W. Rep. 234. *Kansas:* State Sav. Asso. v. Hunt, 17 Kan. 532; Best v. Crall, 23 Kan. 482, 33 Am. Rep. 185. *Louisiana:* Dix v. Tully, 14 La. Ann. 456; Smith v. Isaacs, 23 La. Ann. 454; Louisiana State Bank v. Gaiennie, 21 La. Ann. 555; Gardner v. Maxwell, 27 La. Ann. 561. *Massachusetts:* Taylor v. Wilson, 11 Met. 44; Hunt v. Nevers, 15 Pick. 500, 26 Am. Dec. 616. *Missouri:* Logan v. Smith, 62 Mo. 455. *Nebraska:* Helmer v. Commercial Bank, 28 Neb. 474, 44 N. W. Rep. 482; Koehler v. Dodge, 31 Neb. 328, 47 N. W. Rep. 913; Hayden v. Lincoln City Electric R. Co., 43 Neb. 680, 62 N. W. Rep. 73. *Nevada:* Haydon v. Nicoletti, 18 Nev. 290, 3 Pac. Rep. 473. *New Hampshire:* The cases to the contrary are peculiar to New Hampshire. Jenness v. Bean, 10 N. H. 266; Williams v. Little, 11 N. H. 66. See § 96. *New York:* Duncombe v. New York, H. & N. R. Co., 84 N. Y. 190; City Bank v. Perkins, 29 N.Y. 554; Nelson v. Eaton, 26 N. Y. 410; Poughkeepsie Bank v. Hasbrouck, 6 N.Y. 216; Manhattan Co. v. Reynolds, 2 Hill 140; Nelson v. Wellington, 5 Bosw. 178; Farwell v. Importers' Bank, 90 N.Y. 483; American Exchange Nat. Bank v. New York Belting and P. Co., 148 N.Y. 698, 43 N. E. Rep. 168, 74 Hun 446, 26 N. Y. Supp. 822. *Pennsylvania:* Miller v. Pollock, 99 Pa. St. 202; Bell v. Bell, 12 Pa. St. 235; Gibson v. Lenhart, 101 Pa. St. 522, 111 Pa. St. 624, 5 Atl. Rep. 52. *Tennessee:* Bank v. Stockell, 92 Tenn. 252, 21 S. W. Rep. 523; Roach v.

it is no defense for the maker of a collateral note taken before maturity in good faith, and without notice of any infirmity in it, that it was made for accommodation;[1] or was misapplied by an agent, broker or other person having it for a special purpose;[2] or was pledged by the holder fraudulently, or in violation of a statute making his assignment of it a criminal offense;[3] or that the maker has paid the note to the payee.[4]

If a negotiable promissory note is transferred before maturity as collateral security, the pledgee is protected from garnishment or trustee process in a suit against the payee.[5]

Although a creditor is entitled to the benefit of collateral security provided by the debtor to indemnify a surety, if the surety sell a promissory note so received to a *bona fide* purchaser before its maturity, and appropriate the proceeds to his own private use, and not to the payment of the debt for which he is surety, the creditor can not reach the note in the hands of such purchaser. The fact that the purchaser has afterwards transferred the note to another for no value received, but merely for the purchaser's accommodation, does not affect

Woodall, 91 Tenn. 206, 18 S. W. Rep. 407; Nichol v. Bate, 10 Yerg. 429. *Texas:* Davis v. Gray, 61 Tex. 506; Texas Banking Co. v. Turnley, 61 Tex. 365; Hardie v. Wright, 83 Tex. 345, 18 S. W. Rep. 615; Liddell v. Crain, 53 Tex. 549. *Vermont:* Griswold v. Davis, 31 Vt. 390; Tarbell v. Sturtevant, 26 Vt. 513. *Wisconsin:* Curtis v. Mohr, 18 Wis. 615; Bond v. Wiltse, 12 Wis. 611; Jenkins v. Schaub, 14 Wis. 1; Cook v. Helms, 5 Wis. 107; Lyon v. Ewings, 17 Wis. 61; Kinney v. Kruse, 28 Wis. 183.

[1] Buchanan v. International Bank, 78 Ill. 500.

[2] Exchange Bank v. Butner, 60 Ga. 654; Gammon v. Huse, 9 Ill. App. 557; Farmers' State Bank v. Blevins, 46 Kan. 536, 26 Pac. Rep. 1044; Fisher v. Fisher, 98 Mass. 303; Stoddard v. Kimball, 6 Cush. 469, 4 Cush. 604; McBride v. Potter-Lovell Co., 169 Mass. 7, 47 N. E. Rep. 242; Kellogg v. Tompson, 142 Mass. 76, 6 N. E. Rep. 860; Bowditch v. New England L. Ins. Co., 141 Mass. 292, 4 N. E. Rep. 798; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. Rep. 526; Logan v. Smith, 62 Mo. 455; Zellweger v. Caffe, 5 Duer (N. Y.) 87; Moody v. Andrews, 7 J. & S. (N. Y.) 302, affirmed 64 N. Y. 641; Farwell v. Importers' and Traders' Nat. Bank, 90 N. Y. 483, 16 N. Y. Week. Dig. 20; First Nat. Bank v. Fowler, 36 Ohio St. 524, 38 Am. Rep. 610.

[3] Draper v. Saxton, 118 Mass. 427. And see Pratt v. Maynard, 116 Mass. 388; Stafford v. Whitcomb, 8 Allen (Mass.) 518.

[4] Mayo v. Moore, 28 Ill. 428.

[5] Long v. Johnson, 74 Ga. 4.

the case. In either case the note is beyond the reach of the creditor.[1]

One receiving negotiable paper as collateral security is entitled to be protected as a *bona fide* holder, to the same extent and under the same circumstances as one who becomes owner of such paper.[2] He may maintain trover against a third person who with knowledge of the pledge acquires possession of it and collects it.[3]

A pledgee of negotiable paper before maturity is not affected by a payment made by the maker to the payee, though made in good faith, without knowledge of the assignment of it by the payee as collateral security;[4] unless the maker can prove that such payment was made with the knowledge and consent of the pledgee, or was subsequently ratified by him.[5]

§ 90. **Negotiable paper which is in such form that it passes by delivery merely** may be effectually pledged by the holder, though his title to it be defective, provided the pledgee takes it before maturity in good faith, and without notice of any defense or defect in the title. "Freedom and safety in the negotiation of such paper are a practical necessity, and require that the innocent holder for value be protected against a defective title; and no difference must be made whether he received it from one who obtained it honestly, or by fraud, finding, or theft."[6] Accordingly, where the owner of state bonds in-

[1] Commercial Bank v. Shuart, 46 Barb. (N. Y.) 371.

[2] Bank of N. Y. v. Vanderhorst, 32 N. Y. 553; Brookman v. Metcalf, 32 N. Y. 591; Belmont Branch Bank v. Hoge, 35 N. Y. 65.

[3] Carter v. Lehman, 90 Ala. 126, 7 So. Rep. 735.

[4] Gosling v. Griffin, 85 Tenn. 737; Best v. Crall, 23 Kan. 482, 33 Am. Rep. 185.

[5] City Bank v. Taylor, 60 Iowa 66, 14 N. W. Rep. 128, 15 Rep. 396.

[6] Railroad Co. v. National Bank, 102 U. S. 14; Collins v. Gilbert, 94 U. S. 753; Brown v. Spofford, 95 U. S. 474; Thompson v. Perrine, 106 U. S. 259, 1 S. C. Rep. 564, 568; Goodman v. Simonds, 20 How. 343; Lexington v. Butler, 14 Wall. 282; Cheney v. Stone, 29 Fed. Rep. 885; Coe v. Railroad Co., 19 Blatchf. 522; Cooper v. Thompson, 13 Blatchf. 434. *Illinois:* First Nat. Bank v. Adam, 138 Ill. 483, 28 N. E. Rep. 955; Hunter v. Harris, 131 Ill. 482, 23 N. E. Rep. 626; Gordon v. Adams, 127 Ill. 223; Farber v. National Forge Co., 50 Ill. App. 503; Breier v. Weier, 33 Ill. App. 386. *Kansas:* Branch v. Augusta Nat. Bank, 5 Kan.

trusted them with another for safe keeping, and the latter, in violation of his trust, pledged them as collateral security for a loan made to him by one who took the bonds in good faith, it was held that the owner could not recover them without paying the loan they were given to secure.[1]

The same rule applies where a mortgage with the note secured by it is assigned as collateral security. The mortgage is merely an incident of the note secured by it, and a transfer of the note carries the mortgage with it. The assignee has the rights of a holder of negotiable paper. The note in this respect imparts its character to the mortgage. The freedom from infirmity, which an assignee of the note enjoys when he has

App. 440, 49 Pac. Rep. 344; Lyon v. Martin, 31 Kan. 411, 2 Pac. Rep. 790; Lowden v. Schohari Nat. Bank, 38 Kan. 533, 16 Pac. Rep. 748; First Nat. Bank v. Emmitt, 52 Kan. 603, 35 Pac. Rep. 213. *Kentucky:* Armstrong v. National Bank, 90 Ky. 431, 14 S. W. Rep. 411; Greenwell v. Haydon, 78 Ky. 332. *Maryland:* Maitland v. Citizens' Nat. Bank, 40 Md. 540, 564, 17 Am. Rep. 620. *Massachusetts:* Kellogg v. Tompson, 142 Mass. 76, 6 N. E. Rep. 860; Pettee v. Prout, 3 Gray 502, 63 Am. Dec. 778; Way v. Richardson, 3 Gray 412, 63 Am. Dec. 760; Stoddard v. Kimball, 6 Cush. 469; Blanchard v. Stevens, 3 Cush. 162, 50 Am. Dec. 723. *Michigan:* First Nat. Bank v. Shue, 119 Mich. 560; Williams v. Keyes, 90 Mich. 290, 30 Am. St. Rep. 438, 51 N. W. Rep. 520. *Missouri:* Fitzgerald v. Barker, 85 Mo. 13; Bobb v. Letcher, 30 Mo. App. 43. *Nebraska:* Helmer v. Commercial Bank, 28 Neb. 474, 44 N. W. Rep. 482. *New Hampshire:* Tucker v. New Hampshire Sav. Bank, 58 N. H. 83, 42 Am. Rep. 58. *New York:* Trost v. Hinman, 68 Hun 94, 22 N. Y. Supp. 612. *North Carolina:* Bank v. Burgwyn, 108 N. C. 62, 12 S. E. Rep. 952; Banking Co. v. Railroad, 111 N. C. 122, 15 S. E. Rep. 936; Thompson v. Onley, 96 N. C. 9, 1 S. E. Rep. 620. *Texas:* Stone v. Brown, 54 Tex. 330; Wilson v. Denton, 82 Tex. 531, 18 S. W. Rep. 620.

[1] Tucker v. New Hampshire Sav. Bank, 58 N. H. 83, 42 Am. Rep. 580. See, also, Scotland County v. Hill, 132 U. S. 107, 10 S. C. Rep. 26; Oregon v. Jennings, 119 U. S. 74, 7 S. C. Rep. 124; Jerome v. McCarter, 94 U. S. 734; Hackett v. Ottawa, 99 U. S. 86; Ottawa v. National Bank, 105 U. S. 342; Insurance Co. v. Bruce, 105 U. S. 328. *Illinois:* Johnson v. County of Stark, 24 Ill. 75; Porter v. Pittsburg Steel Co., 122 U. S. 267, 120 U. S. 649, 7 S.C. Rep. 1206. *Maryland:* Third Nat. Bank v. Boyd, 44 Md. 47. *Massachusetts:* Royal Bank v. Grand Junction R. Co., 100 Mass. 444. *New Jersey:* Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. Rep. 318; Boyd v. Kennedy, 38 N. J. L. 146; Knapp v. Mayor, 39 N. J. L. 394. *New York:* Brainard v. New York and Harlem R. Co., 25 N.Y. 496. *Pennsylvania:* Gibson v. Lenhart, 101 Pa. St. 522, 111 Pa. St. 624, 5 Atl. Rep. 52; Kerr v. Corry, 105 Pa. St. 282.

taken it for value and in good faith before maturity, is not destroyed or made less by his taking with the note a mortgage intended to secure it.[1]

§ 91. **Possession of a negotiable bond or other paper not requiring indorsement** is sufficient to enable the holder to pledge it, although he has no title. Thus, if United States bonds deposited with a bank for safe keeping be wrongfully pledged by the cashier, the pledgee acting in good faith takes a good title. If afterwards the cashier fraudulently obtains possession of the bonds from the pledgee, the latter is not divested of his title, and the depositor has no better claim to them than he had when they were in the pledgee's possession. The fact that by the second fraudulent act of the cashier the bonds are replaced in the vaults of the bank, from which they had been dishonestly removed, does not put the depositor in the position which he would have occupied had the deposit been respected from the first.[2]

A pledge of negotiable paper to one acting in good faith and in the usual course of business is valid, though the pledgor acted in violation of a statute in borrowing the money and making the pledge. Thus, where a statute provided that no member of a committee and no officer of a domestic insurance company who is charged with the duty of investing its funds, shall borrow the same, if such an officer borrows money of the company and fraudulently pledges for the loan negotiable bonds belonging to another, without his knowledge, the loan

[1] Paige v. Chapman, 58 N. H. 333.

[2] Gibson v. Lenhart, 101 Pa. St. 522; Ringling v. Kohn, 4 Mo. App. 59; International Bank v. German Bank, 3 Mo. App. 362; Commissioners v. Bolles, 94 U. S. 109; Beaver County v. Armstrong, 44 Pa. St. 63; Smith v. Railroad, 91 Tenn. 221, 18 S. W. Rep. 546; Memphis Bethel v. Bank, 101 Tenn. 130, 45 S. W. Rep. 1072; Texas Banking and Ins. Co. v. Turnley, 61 Tex. 365; Kellogg v. Tompson, 142 Mass. 76, 6 N. E. Rep. 860; First Nat. Bank v. Adam, 138 Ill. 483, 28 N. E. Rep. 955; Town of Ontario v. Union Bank, 21 Misc. (N. Y.) 770; Town of Solon v. Williamsburg Sav. Bank, 114 N. Y. 122, 21 N. E. Rep. 168; Cagwin v. Town of Hancock, 84 N. Y. 532; Dodge v. County of Platte, 82 N. Y. 218.

and pledge are valid if the company acts in good faith and without notice of the fraud.[1]

§ 92. **A note payable to order may be pledged by the payee by delivery merely** without indorsement, so as to give an equitable security good as between the parties. The pledge of a note in this manner operates as an equitable assignment of it to the pledgee, who, under common law rules, can maintain a suit upon it in the name of the pledgor, and, under the code practice in several states, may maintain such action in his own name.[2]

The mere possession of such a note not indorsed to the holder is not sufficient evidence that he holds the note in pledge to secure a debt. There must be evidence of a contract of pledge before he can be adjudged a pledgee of such note.[3]

§ 93. **But a mere deposit as collateral of commercial paper, payable to order and not indorsed,** does not operate to divest the payee of his legal ownership; and, therefore, in a suit upon such note the maker may set up in defense any equitable defenses he has against the payee.[4] The holder in such case has only an equitable title, the legal title remaining in the payee, in whose name a suit must ordinarily be prosecuted, and against whom any equitable defense may be set up by the maker. Thus, it is a good defense on his part that after the note was pledged he had paid it to the payee in good faith, and without notice of the pledgee's claim.[5]

[1] Bowditch v. New England L. Ins. Co., 141 Mass. 292, 4 N. E. Rep. 798. And see Holden v. Upton, 134 Mass. 177; Gold-Mining Co. v. Nat. Bank, 96 U. S. 640; Nat. Bank v. Matthews, 98 U. S. 621; Nat. Bank v. Whitney, 103 U. S. 99; Reynolds v. Crawfordsville Nat. Bank, 112 U. S. 405, 5 S. C. Rep. 213; Savannah Bank & Trust Co. v. Hartridge, 73 Ga. 223.

[2] Van Riper v. Baldwin, 19 Hun (N. Y.) 344; Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. Rep. 197.

[3] Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. Rep. 727.

[4] Hedges v. Sealy, 9 Barb. (N. Y.) 214; Snow v. Fourth Nat. Bank, 7 Rob. (N. Y.) 479; Easter v. Minard, 26 Ill. 494. And see Casey v. Cavaroc, 96 U. S. 467.

[5] Dunn v. Meserve, 58 N. H. 429.

§ 93a. **That the debt secured is usurious does not prevent the pledgee from being a bona fide holder of negotiable paper as collateral security.** He is entitled to protection to the extent of the sum lawfully due on the debt secured,[1] unless the statute makes the usurious debt wholly void, when of course the pledge would be void.[2]

§ 94. **A pledgee of negotiable paper can give good title to it.** Here is another distinction between a pledge of negotiable securities and one of corporeal property; for while a pledgee of the latter species of property can convey no greater right or title than he has, unless he is himself invested with the apparent absolute title by an instrument in writing executed by the pledgor, a pledgee of negotiable securities, by reason of their negotiability, can pass a good title, by delivery or indorsement, to an innocent third person having no knowledge of the claims of the true owner.[3] The title of such third party depends not upon the interest or authority of the pledgee, but

[1] Oates v. First Nat. Bank, 100 U. S. 239, 248; Williams v. Tilt, 36 N. Y. 319; Oppenheimer v. Bank, 97 Tenn. 19; Memphis Bethel v. Bank, 101 Tenn. 130, 45 S. W. Rep. 1072.

[2] McFerrin v. White, 6 Cold. (Tenn.) 499.

[3] *California:* Coit v. Humbert, 5 Cal. 260, 63 Am. Rep. 128; Robinson v. Smith, 14 Cal. 94. *Connecticut:* Simpson v. Hall, 47 Conn. 417. *Indiana:* Valette v. Mason, 1 Ind. 288. *Iowa:* Iowa College v. Hill, 12 Iowa 462. *Kentucky:* Patterson v. Deering, 1 Marsh. 326. *Louisiana:* Pavey v. Stauffer, 45 La. Ann. 353, 12 So. Rep. 512. Negotiable paper may be pledged by delivery merely. Act of March 15, 1855, Rev. Stats. 1876, § 2904; Casey v. Schneider, 95 U. S. 497; Partée v. Corning, 9 La. Ann. 539. *Massachusetts:* Spaulding v. Kendrick, 172 Mass. 71, 51 N. E. Rep. 453; Merchants' Ins. Co. v. Abbott, 131 Mass. 397; Greenfield School Dist. v. First Nat. Bank, 102 Mass. 174; Thacher v. Pray, 113 Mass. 291; Mason v. Waite, 17 Mass. 560, 563; Sargent v. Metcalf, 5 Gray 306, 66 Am. Dec. 368; Stoddard v. Kimball, 6 Cush. 469; Fisher v. Fisher, 98 Mass. 303; Wheeler v. Guild, 20 Pick. 545, 32 Am. Rep. 231. *Minnesota:* Merchant's Nat. Bank v. Allemania Bank, 71 Minn. 477, 74 N. W. Rep. 203. *Missouri:* Weber v. Orten, 91 Mo. 677, 4 S. W. Rep. 271. *Nevada:* Haydon v. Nicoletti, 18 Nev. 299, 3 Pac. Rep. 473. *New York:* Ballard v. Burgett, 40 N. Y. 314; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, overruling 55 Barb. 59, 7 Am. Rep. 341; Moore v. Miller, 6 Lans. 396; Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 N. E. Rep. 180. *Oregon:* Currie v. Bowman, 25 Ore. 364, 35 Pac. Rep. 848. *Vermont:* Blake v. Buchanan, 22 Vt. 548; Atkinson v. Brooks, 26 Vt. 569.

upon the act of the pledgor, in making the pledgee the apparent absolute owner of the securities; and the pledgor thereby precludes himself from disputing the title or authority he has so conferred. The owner of negotiable securities, having allowed them to go into the market with the transferable qualities of negotiable paper, it does not lie in the mouth of him who offered them to the world in that shape to deny the effect of his own act.

§ 95. **If a pledgee holding the note of a third person as security for his debtor's note transfer the collateral note, retaining the principal note,** the transfer as between him and the pledgor operates *pro tanto* as payment of the original debt;[1] and it is immaterial in this respect whether the collateral note be overdue or not. If, after such transfer of the collateral note, the pledgee transfer the principal note to another person, and this note be overdue at the time, the assignee takes it subject to the equities existing between the pledgor and pledgee in regard to the collateral note; that is, the assignee takes it subject to a credit *pro tanto*, or subject to payment, according to the amount of the collateral.[2] If the principal note be transferred before its maturity, but after a transfer of the collateral note, and the transferee take it for value without notice of the collateral note, he acquires a title to it subject to no equities existing between prior parties. In such case the loss would fall upon the pledgor, who had by his negligence enabled the pledgee to transfer both notes, and to give good title to both without notice that one was collateral to the other. If the original note be first transferred, the assignee is entitled to the collateral note, if this be still in the hands of the pledgee.[3]

§ 96. **An agent holding negotiable paper for collection or safe keeping can effectually pledge it** for his own debt, in fraud of the true owner, if it be in such form that the title will

[1] Cocke v. Chaney, 14 Ala. 65; and see Harris v. Johnston, 3 Cranch 311.

[2] Ware v. Russell, 57 Ala. 43, 29 Am. Rep. 710.

[3] Ware v. Russell, 57 Ala. 43.

pass by delivery. Thus, if a note or bill of exchange be indorsed in blank by the owner, and placed in the hands of a banker for collection, the latter can pledge it for a debt of his own.[1] In some cases it has been sought to make a distinction between a pledge and a sale of such paper by the agent; but there is no such distinction, and the courts have refused to recognize one.[2] The agent's breach of confidence is as great in one case as in the other. "He may sell because the property has been intrusted to him, and he may pledge for the same reason; for he who has the property has a disposing power, and the law has not limited it to be used in any particular manner."[3]

[1] Treuttel v. Barandon, 8 Taunt. 100; Lloyd v. Sigourney, 5 Bing. 525; Sigourney v. Lloyd, 8 B. & Cr. 622; Goodman v. Harvey, 4 Ad. & E. 870; Wookey v. Pole, 4 B. & Ald. 1; Brandao v. Barnett, 2 Scott N. R. 96; Gorgier v. Mieville, 3 B. & Cr. 45; Collins v. Martin, 1 B. & P. 648; Clement v. Leverett, 12 N. H. 317; Tucker v. N. H. Sav. Bank, 58 N. H. 83, 42 Am. Rep. 580; Morris v. Preston, 93 Ill. 215.

[2] "The peculiar doctrine, as expressed in Jenness v. Bean, 10 N. H. 266, 34 Am. Dec. 152, and Williams v. Little, 11 N. H. 66, that negotiable paper, pledged to the holder as collateral security, is not, in the hands of an innocent pledgee, exonerated from defenses or defective title, is not recognized outside of New Hampshire, and within this state has been so limited as not to include cases like the one under consideration. In Clement v. Leverett, 12 N. H. 317, an agent of the defendants, intrusted by them with bills drawn by him payable to his own order, and by them accepted to enable him to raise money for them, pledged the bills to a *bona fide* holder to secure money borrowed for his own use. It was held that the defendants, having enabled their agent to hold himself out as owner, were bound by the pledge, and liable to the pledgee. Parker, C. J., delivering the opinion, says, of Jenness v. Bean, 34 Am. Dec. 152, and Williams v. Little, that the court advanced the doctrine of those cases, because the general ownership or property of the bill or note pledged as collateral security remained in the indorser. 'But,' he remarks, 'there is another principle, of earlier application, and of paramount influence in this case (Clement v. Leverett). The defendants intrusted Burley (their agent) with these bills, accepted by them, and thereby enabled him to hold himself out as the owner of them. . . . Assuming that Burley abused the confidence reposed in him, the defendants, who intrusted him with these negotiable evidences of debts against themselves, must bear the loss. . . The plaintiff is a *bona fide* holder without notice.'" Tucker v. New Hampshire Savings Bank, 58 N. H. 83, 85, 42 Am. Rep. 580, per Allen, J.

[3] Per Eyre, C. J., in Collins v. Martin, 1 B. & P. 648.

If a broker holding the promissory notes of several of his customers for sale for their benefit fraudulently pledges all of them at different times to secure the same debt from himself to the pledgee, who takes them in good faith, for value, without notice, and the pledgee collects enough of the notes to satisfy the debt of the pledgor, on a bill in equity brought by one of the makers against the others for contribution, it will be held that the whole loss shall be borne by all the makers in proportion to the amounts of the notes so pledged; and that it is immaterial that one of the makers demanded his note of the pledgor before it had been pledged.[1]

§ 97. **Misapplication by debtor's agent.**—Neither is the lender of money upon collateral securities, whether negotiable or not, bound to see that an agent or other person, acting for the borrower, applies the money to the use of his principal. Thus, the owner of a bond and mortgage, wishing to obtain a loan upon them, placed them in the hands of an agent, who gave a receipt that he had received the same to raise money upon; or if he should give the money to the owner, or pay it for him at his request, he should hold the same as security until repaid. The agent procured the money from a third person, and assigned him the bond and mortgage; and it was held that such lender was not bound to see what disposition the agent made of the money. The borrower, having given credit to the agent, must look to him for the money, and not to the lender dealing with the agent in good faith.[2] And so, where the payee of certain notes secured by mortgage indorsed them in blank and placed them in the hands of a banker as his agent, to collect the interest and to sell them for his benefit, and the agent pledged them to secure a debt of his own, it was held that the owner of the notes could not invalidate the title of the pledgee, who had acquired the notes in the usual course of business from one who apparently had the absolute title.[3]

[1] McBride v. Potter-Lovell Co., 169 Mass. 7, 47 N. E. Rep. 242. And see Farwell v. Importers' and T. Nat. Bank, 90 N. Y. 483; Bond v. Wiltse, 12 Wis. 611.

[2] Westervelt v. Scott, 11 N. J. Eq. 80.

[3] Morris v. Preston, 93 Ill. 215.

§ 98. **A statute declaring the assignment of collateral security before the debt secured is due a criminal offense**[1] does not affect the title of an innocent assignee, who takes such security for value, and without notice of the fraud of the assignor.[2]

§ 99. **A note founded upon a consideration made illegal by statute**—as, for instance, a note given for liquors sold in violation of law, but not declared void by the express terms of the enactment—is not open to defense in the hands of one to whom the payee has indorsed it before maturity as collateral security for a pre-existing debt. Mere illegality of consideration does not extend to, or affect the rights of, an indorsee for value and without notice.[3]

§ 100. **Notice of equities.**—Actual knowledge on the part of one taking negotiable paper before maturity, that the assignor held it as collateral security, would, of course, subject the assignee to the equities of the owner of such security.[4] Such knowledge might be shown by circumstances; but the circumstances must be such that actual knowledge can be inferred from them. Thus, in a modern case,[5] two circumstances were relied upon to subject a note so assigned to the equitable rights of the pledgor. The first was that the assignee of the note knew that the assignor was a broker. But the court said it is no ground to presume or suspect that, merely because a man is a broker, he has no negotiable paper in his hands except such as he holds as collateral security, and has no right to transfer. The next circumstance was that, when the pledgee transferred the note, he stated to the assignee that at or before its maturity he should wish to change it, and substitute other security; and it was contended that this request indicated that he had no right to transfer it.

[1] As does Gen. Sts. of Mass., c. 161, § 64; P. S. 1882, c. 203, § 72.

[2] Draper v. Saxton, 118 Mass. 427; Gardner v. Gager, 1 Allen (Mass.) 502.

[3] Cobb v. Doyle, 7 R. I. 550; Taylor v. Page, 6 Allen (Mass.) 86.

[4] Patterson v. Deering, 1 Marsh. (Ky.) 326.

[5] Gardner v. Gager, 1 Allen (Mass.) 502.

But in this case the pledgee borrowed of the assignee upon the note only a part of the amount which the note was given for, and he borrowed it for a time extending beyond the maturity of that note. Therefore, the request would indicate that the pledgee owned the note, and desired to collect it and use the money at its maturity. At least, it did not indicate the contrary.

Where a draft is made payable to the order of the cashier of a bank, and is by him indorsed to the cashier of another bank "for collection, for account of" the first bank, the indorsement is merely a warrant of attorney authorizing the indorsee to collect the amount due on the draft for the indorser. It conveys no title except for that purpose, and is notice to all persons subsequently taking the draft that the indorser has not parted with the title and does not intend to transfer the ownership of the proceeds to another.[1]

One taking a negotiable note before maturity as collateral security without notice of defense to it is not affected by notice received by his assignor.[2]

§ 101. **The fact that a note taken as collateral security bears no indorsement of several installments of interest that have fallen due does not render it subject to equities** existing between the original parties to it.[3] Even if failure to pay interest amounted to a dishonor of the note, it would only affect one who has knowledge of the fact. "Payment of interest," say the court, "is not always indorsed, and other evidence is often relied on to prove it. Want of indorsement does not apprise the party to whom such note is transferred that there has been no payment; and when the note is only taken as collateral, and accuracy is not required in ascertaining the amount due for interest, the fact that overdue interest is not indorsed might have slight influence in putting the purchaser upon his inquiry. It has, indeed, been held by this court

[1] Central Railroad v. First National Bank, 73 Ga. 383.

[2] Cook v. Norwood, 106 Ill. 558.

[3] National Bank of N. A. v. Kirby, 108 Mass. 495.

that a note, the principal of which is payable by installments, is overdue when the first installment is overdue and unpaid, and is thereby subject to all equities between the original parties.[1] Such a note is a single contract, and the party to whom it is transferred must take it with notice that, as to the overdue installment, the maker may have a justifiable cause for withholding payment, which may affect the whole contract. But in its effect upon the credit of a note it is manifest that a failure to pay interest is not to be ranked with a failure to pay principal. Interest is an incident of the debt, and differs from it in many respects."

But the court, while refusing to hold that the non-payment of interest upon the collateral note was not sufficient to discredit the note, and subject the holder to antecedent equities, held that it was a fact proper to be considered by the jury, in connection with other circumstances, on the question whether the holder took the note in good faith and without notice of existing defenses.

§ 102. **A note which states that it is to be held as collateral security is not negotiable.**[2] And so a memorandum put upon a promissory note, by the maker of it, before delivery, that it is given as collateral security, destroys its negotiability; for the words indicate that there may be a contingency, namely, the performance of the undertaking to which it is collateral, in which the note would not be payable; and so it lacks that element of negotiability which requires that at all events a sum certain shall be payable at a time certain. Therefore an action can not be maintained upon such a note by an indorsee, nor can an indorser of it be charged and held liable as an indorser of negotiable paper.[3]

A memorandum on the back of a promissory note, signed in the name of a partnership, that the note was given as security

[1] Vinton v. King, 4 Allen (Mass.) 562.

[2] Haskell v. Lambert, 16 Gray (Mass.) 592; Robins v. May, 11 Ad. & E. 213.

[3] Costelo v. Crowell, 127 Mass. 293, 34 Am. Rep. 367; Haskell v. Lambert, 16 Gray (Mass.) 592.

for another note of the same date and amount, and payable at the same time, made by a third person, is sufficient to charge a bank taking both notes as security for a loan with notice that the partnership note was given as security only for the payment of the other note. In an action by the bank against the partnership, the burden is upon the bank to show that the note was given with the consent of all the partners, or in payment of a debt contracted in the course of the partnership business; and, therefore, if it appear that the note was fraudulently signed by one of the partners without the knowledge of the other partners, the bank can not recover upon it.[1]

Parol evidence is admissible to show what debts are secured by a note which contains upon its face a memorandum that it is "to be used as collateral security" to notes of a person named. The purpose of such evidence is to correctly apply the note to the transactions the note itself indicated it was intended to cover, and confine it to the very claims it purported to secure, and not to alter its terms.[2]

§ 103. **But a recital in a negotiable note that the maker has deposited collateral security** for its payment, and given authority to sell the same on non-payment of the note, does not destroy its negotiable character.[3] "The only contract as to collateral security, recited in this note, relates to what shall be done after the note becomes due, if it is unpaid. If, as between the maker and the original holder who received the collateral security, there has been any payment before the note became due, by the receipt of sums collected upon the security, that can not affect one to whom the note has been transferred before maturity, without notice. It will have been done in pursuance of some agreement which does not appear on the

[1] National Security Bank v. McDonald, 127 Mass. 82.

[2] Garton v. Union City Bank, 34 Mich. 279.

[3] Towne v. Rice, 122 Mass. 67; Stults v. Silva, 119 Mass. 139; Draper v. Saxton, 118 Mass. 427; Branning v. Markham, 12 Allen (Mass.) 454; Willoughby v. Comstock, 3 Hill (N. Y.) 389; Arnold v. Rock River Valley R. Co., 5 Duer (N. Y.) 207; Cook v. Satterlee, 6 Cow. (N. Y.) 108, 16 Am. Dec. 432. So by statute in North Dakota, R. Code 1895, § 4858, and in South Dakota, Annot. Stat. 1899, § 5664.

face of the note, and of which, therefore, he had no notice. He is entitled to occupy the same position that he would if the holder of a negotiable note in the ordinary form had received a sum which, as between himself and the maker, should be applied to the note, and had afterwards transferred it to them without notice and before maturity. Nor does the fact, if this note is unpaid, that the amount due after maturity will depend upon the action of the holder of the collateral securities, by reason of his option to sell and realize such securities, and will thus be uncertain, destroy its negotiable character before maturity. After a negotiable note has become due it is still transferable, although it has lost the great characteristic which gives value to it as commercial paper. The purchaser, although he may sue upon it in his own name, then receives it with full notice of all defects, and subject to every equitable defense which the promisor may make against the promisee. If the note embodies a promise to pay money, definite as to time, person, and amount, it is not the less negotiable, because, if unperformed at maturity, certain collateral securities, the proceeds of which will then be applicable to the note, may be realized, and when realized, will affect the amount which will thereafter be due on it.'"[1]

And so a promissory note which recites that the maker has deposited bonds as collateral security for its payment, with power to sell them in a certain manner and upon specified notice upon the non-payment of the note at maturity, is negotiable, although it also contains an agreement that the maker will pay any deficiency necessary to satisfy the note after such sale.[2] Such a note is payable absolutely, without any contingency, and is not payable out of a particular fund. "It is not the less a promissory note from a memorandum of another kind being added, importing that a collateral security has also been given.'"[3] The collateral contract relates solely to the money

[1] Towne v. Rice, 122 Mass. 67, per Devens, J.

[2] Arnold v. Rock River Valley Union R. Co., 5 Duer (N. Y.) 207.

[3] Wise v. Charlton, 4 Ad. & E. 786, 791, per Coleridge, J. See, also, Fancourt v. Thorne, 9 Q. B. 312.

promised to be paid, is additional to the principal contract, and is not, in terms or legal effect, a modification of it. It merely provides a security for the payment of the money, and prescribes the extent of the maker's liability after the security has been exhausted. But the law would have implied the same liability without any special contract. "Such an instrument is quite different from one which, in addition to a note perfect in form, should contain a contract having no relation to the money promised to be paid, and wholly independent of it. If the additional contract was for the sale or leasing of land, or the sale or exchange of personal property, or related to any other distinct and independent subject, there would be many reasons for declaring the instrument not negotiable, which can have no application to that under consideration."[1]

§ 104. **Even gross negligence on the part of one taking negotiable paper as collateral security is not alone sufficient to defeat his title.** He is not bound to make inquiry as to the authority of the person offering the paper to pledge it. Nothing less than proof of knowledge of facts that show want of such authority will invalidate the pledgee's title. Gross negligence, not amounting to willful and fraudulent blindness, while it is evidence of *mala fides*, is not the same thing.[2] Nothing short of fraud, or gross negligence attended with *mala fides* on the part of the taker of the instrument, will invalidate his

[1] Arnold v. Rock River Valley Union R. Co., 5 Duer (N. Y.), per Bosworth, J.

[2] Goodman v. Harvey, 4 Ad. & E. 870; Uther v. Rich, 10 Ad. & E. 784; Raphael v. Bank of Eng., 17 C. B. 161; Murray v. Lardner, 2 Wall. 110; Goodman v. Simonds, 20 How. 343, where the subject is fully and ably considered; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; Citizens' Nat. Bank v. Hooper, 47 Md. 88; Iowa College v. Hill, 12 Iowa 462; Johnson v. Way, 27 Ohio St. 374; Smith v. Livingston, 111 Mass. 342; Belmont Branch Bank v. Hoge, 35 N. Y. 65; Woolfolk v. Bank of America, 10 Bush (Ky.) 504; Benoir v. Paquin, 40 Vt. 199; Comstock v. Hannah, 76 Ill. 530; Shreeves v. Allen, 79 Ill. 553. These cases in Illinois accept the doctrine above stated, and limit or disapprove of the earlier cases in that state, which seem to adopt the contrary doctrine, such as Russell v. Hadduck, 3 Gilm. 233, 44 Am. Dec. 693; Sturges v. Metropolitan Nat. Bank, 49 Ill. 221; Taylor v. Atchison, 54 Ill. 196, 5 Am. Rep. 118.

title. Actual knowledge on his part of facts and circumstances which show that the holder did not act in good faith in taking the security must be proved to defeat his title; and the question whether he has such knowledge is a question of fact for the jury.[1]

§ 105.' **Knowledge of want of authority.** But if one taking negotiable paper, by way of collateral security, has knowledge that the person offering it has no authority to pledge it, or has knowledge of facts from which a jury might find such knowl-

[1] Railroad Co. v. National Bank, 102 U. S. 14, 39, per Clifford, J. "Indorsers of negotiable securities enjoyed the protection of that rule for ages before any successful attempt was made to annex to it any qualification, unless it appeared that the consideration was illegal, or that the instrument was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder. Hinton's Case, 2 Show. 235; Anonymous, 1 Salk. 126; Miller v. Race, 1 Burr. 452; Grant v. Vaughan, 3 Burr. 1516; Peacock v. Rhodes, 3 Doug. 633; Lawson v. Weston, 4 Esp. 56.

"Throughout the whole period covered by those decisions, it was universally understood that the title of the *bona fide* holder was unaffected by any equities between the antecedent parties; but it was subsequently decided that if the indorser of the instrument had no valid title to the same, and that such facts and circumstances were known to the indorsee, at the time of the transfer, as would have caused a person of ordinary prudence to suspect that the indorser had no right to transfer the instrument, or to use the same for his own benefit, then the holder, as against the acceptor or maker, is not entitled to recover. Gill v. Cubitt, 3 B. & Cr. 466.

"For a brief period that rule was followed, but it was never satisfactory, and at the end of twelve years was distinctly overruled in the tribunal where it was first promulgated. Goodman v. Harvey, 4 Ad. & E. 870; Arbouin v. Anderson, 1 Ad. & E. N. S. 498. 'We must hold,' said Lord Denman, in the case last cited, 'that the owner of a bill of exchange is entitled to recover upon it if he has come by it honestly, and that that fact is implied *prima facie* by possession, and that, to meet the inference so raised, fraud, felony, or some such matter, must be proved'

"Abundant authority to support the proposition, that the case which for a period relaxed that rule has been overruled for more than half a century, is found in the reported cases already cited; and Mr. Chitty says that the old rule of law, that the holder of a negotiable security transferable by delivery can give a title, which he himself does not possess, to a person taking the same *bona fide* for value, is by those decisions again re-established in its fullest extent. Chitty Bills (13th ed.) 257; Worcester County Bank v. Dorchester & Milton Bank, 10 Cush. (Mass.) 491, 57 Am. Dec. 120."

edge, his taking of the paper as security for a loan actually made imparts no title as against the real owner.[1] Thus, if a bill-broker offer a note for sale at his own bank, and states that he is limited to a certain rate of discount, and the bank declines to purchase at that rate, and the same day the broker pledges the note to the bank as collateral security for a loan, a jury would be authorized to find that the bank had knowledge that the broker had possession of the paper only for the purpose of selling it, and had no authority to pledge it.[2]

Whether the holder of such paper had notice at the time of taking it of want of authority in the payee to use it as his own is a question of fact for the jury; but the burden of proof is upon the defendant who seeks to impeach the plaintiff's title by alleging notice of the fraud or breach of duty by the payee.[3] The transfer of negotiable paper before maturity raises the presumption of the want of notice of any defense to it; and this presumption prevails until overcome by proof.[4]

A corporation largely indebted to a national bank mortgaged its property to a trust company to secure an issue of bonds, which were left in the possession of the trust company, to be delivered to the cashier of the bank for sale, on his demand, the proceeds to be credited to the corporation's account at the bank. A portion of the bonds had been sold and credit given, when, in the absence of the cashier, the corporation was notified that certain of its paper was due. An agreement was thereupon made with the assistant cashier that credit should be extended until the cashier's return upon the condition that the remainder of the bonds should be held by the bank as collateral security, the corporation thereupon giving a note reciting that it was secured by said bonds. Upon the cashier's return a renewal was provided for, the corporation consenting

[1] Citizens' Nat. Bank v. Hooper, 47 Md. 88; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 568, 17 Am. Rep. 620; Patterson v. Deering, 1 Marsh. (Ky.) 326; Security Bank v. Kingsland, 5 N. Dak. 263, 65 N. W. Rep. 697.

[2] Citizens' Nat. Bank v. Hooper, 47 Md. 88.

[3] Goodman v. Simonds, 20 How. 343; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

[4] Carpenter v. Longan, 16 Wall. 271.

that the bank should hold the bonds as collateral for all of its indebtedness. The cashier, after obtaining the bonds from the mortgagee, and depositing them in the vaults of the bank, sought to pledge them to the bank as security for his own debt. It was held that the bonds were received by the cashier, in his official capacity, as collateral to the corporation's indebtedness, and that they should be so treated by the bank.[1]

§ 106. **For future advances.**—A promissory note pledged before maturity, as collateral security for future advances, is good in the creditor's hands for all advances made before he has notice of equities between the original parties; but not for advances made after such notice,[2] unless the creditor at the time of taking the security bound himself to make advances to a definite amount. Accommodation paper may be pledged for future advances, and may be enforced under the same circumstances that other paper would be enforced;[3] and it is no defense that the pledgee had knowledge at the time of taking the notes that they were made for accommodation.[4]

One receiving a promissory note as collateral security for indorsements afterwards to be made is a *bona fide* holder in the commercial sense; but he can, of course, recover upon it only the amount due on the indorsements against which it was designed to secure him.[5]

Of course, paper taken as collateral security after its maturity is subject to any defense which the maker of it could have set up to it if it had remained in the hands of the payee.[6]

[1] Detroit Motor Co. v. Third National Bank, 111 Mich. 407, 69 N. W. Rep. 726.

[2] Merchants' Nat. Bank v. Hall, 83 N. Y. 338; Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 208; Davis v. Randall, 115 Mass. 547; Walker v. Kee, 14 S. C. 142; Kerr v. Cowen, Dev. (N. C.) Eq. 356.

[3] Buchanan v. International Bank, 78 Ill. 500.

[4] Buchanan v. International Bank, 78 Ill. 500; Matthews v. Rutherford, 7 La. Ann. 225; Maitland v. Citizens' Nat. Bank, 40 Md. 540.

[5] Williams v. Smith, 2 Hill (N. Y.) 301.

[6] Lane v. Padelford, 14 Me. 94; Kelly v. Ferguson, 46 How. Pr. (N. Y.) 411.

III. *Collateral for a Pre-existing Debt.*

§ 107. **Whether a previous debt is sufficient to constitute a holding for value of collateral negotiable paper** is a question upon which there has been a conflict of authority in this country since the decision in Bay v. Coddington.[1] This decision introduced an exception in the general rule of law respecting negotiable paper, that one who has taken it before maturity in the usual course of business, for a valuable consideration, is a *bona fide* holder, and is protected against equities existing between the antecedent parties, of which he had no notice. The great authority of Chancellor Kent,[2] who rendered the first decision in the case which has led the way in establishing this new doctrine, has served to obtain full recognition of it in nearly half of the states in which the point has arisen and been decided, notwithstanding the high authority of the Supreme Court of the United States has uniformly been against it. In Swift v. Tyson[3] that court declined to follow the New York rule in a case arising in that state, inasmuch as it related to a matter of general commercial law, and therefore the local law was not binding upon the supreme court. Mr. Justice Story, speaking for the court upon the general subject of the true commercial rule applicable to the case, said: "We have no hesitation in saying that a pre-existing debt does con-

[1] Johns. (N. Y.) Ch. 54; affirmed 20 Johns. (N. Y.) 637, 9 Am. Dec. 268; followed by Stalker v. M'Donald, 6 Hill (N. Y.) 93, 11 Am. Dec. 389; Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142; and numerous other cases in that and other states.

[2] It is to be noticed that Chancellor Kent, in his Commentaries, vol. III, p. 81, note *b*, in noticing the cases of Bay v. Coddington and Swift v. Tyson, says of the latter: "I am inclined to concur in that decision, as the plainer and better doctrine." Unfortunately, the erroneous doctrine, having the start by a score of years, had taken root in New York, and had spread thence to other states.

"There is, perhaps, no question connected with the mercantile law which is of more importance, and upon which, at the same time, there is a more distressing conflict of authority." Per Moncure, J., in Davis v. Miller, 14 Gratt. (Va.) 1, 14.

[3] 16 Peters 1 (1842); followed in Bank of Metropolis v. N. E. Bank, 1 How. 234; Goodman v. Simonds, 20 How. 343; McCarty v. Roots, 21 How. 432; Oates v. First National Bank, 100 U. S. 239; Railroad Company v. National Bank, 102 U. S. 14.

stitute a valuable consideration, in the sense of the general rule already stated as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business, for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of, or as security for, a pre-existing debt is according to the known usual course of trade and business. And why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper can not be applied in payment of, or as security for, pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts."

§ 107a. **A pledge of negotiable paper differs materially in this respect from a pledge of chattels**; for it is a settled rule that a pledge of chattels as security for a pre-existing debt does not constitute the pledge a holder for value, when there is no present consideration.[1]

[1] Currie v. Misa, L. R. 10 Ex. 153, 1 App. Cas. 554; Leask v. Scott, 2 Q. B. D. 376; Chartered Bank of India v. Henderson, L. R. 5 P. C. 501; Lesas-

Goods were sold under an agreement by which the purchaser was not to have possession until he made full payment. Some three weeks after, he made a partial payment of the agreed price, and received possession upon giving his check for the balance, having no reason to believe that it would be paid, but the contrary. His failure occurred before the check was presented in the regular course of business through the clearing-house, and at the time of such presentation the purchaser had already pledged the goods to one of his creditors for a pre-existing debt, without any other consideration. It was held, that the seller was entitled, in equity, upon surrendering the check, to have the amount thereof paid to him from the proceeds of the goods realized by the pledgee.[1]

A similar rule applies to a mortgage made to secure a pre-existing debt, for while such a debt constitutes a good consideration as between the parties, it does not constitute the grantee a purchaser for value, so as to protect him against prior equities. Neither is a judgment creditor,[2] or an attaching creditor, or an assignee in insolvency or bankruptcy, or an assignee for creditors under an assignment executed by the debtor, a purchaser for value within the meaning of the rule applied to a pledge of negotiable paper for a pre-existing debt.[3]

When, however, chattels are transferred in good faith in payment of a pre-existing debt, the transfer is generally regarded as constituting the grantee a purchaser for value.[4]

§ 108. **The courts of the United States have uniformly held a pre-existing debt to be a sufficient consideration for a pledge** of negotiable collaterals; declining to follow the decisions of state courts, which have adopted the rule that the holder of

sier v. The Southwestern, 2 Woods 35; Goodwin v. Massachusetts Loan and Trust Co., 152 Mass. 189, 26 N. E. Rep. 100; Merchants' Ins. Co. v. Abbott, 131 Mass. 397, 400; Sleeper v. Davis, 64 N. H. 59, 6 Atl. Rep. 201; Linnard's App. (Pa.), 3 Atl. Rep. 840; Wert v. Naylor, 93 Ind. 431.

[1] Goodwin v. Massachusetts Loan and Trust Co., 152 Mass. 189, 25 N. E. Rep. 100.

[2] Jones on Mortgages, § 460.

[3] Jones on Mortgages, § 462; Goodwin v. Massachusetts Loan and Trust Co., 152 Mass. 189, 199, 25 N. E. Rep. 100.

[4] State Bank v. Frame, 112 Mo. 502, 20 S. W. Rep. 620.

negotiable paper, transferred merely as collateral security for an antecedent debt, is not a holder for value. It has been urged that under the Judiciary Act,[1] the national courts are obliged to follow the decisions of the state courts in all cases where they apply. To this contention the Supreme Court replied, in the case of Swift v. Tyson,[2] that "it has never been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

§ 109. **To this doctrine the Supreme Court has steadily adhered.**[3] In a very recent case, the parties to which were citizens of New York, where the contract was also made, it was again claimed that the decisions of that state, that negotiable paper transferred merely as collateral security for an antecedent debt, is subject to the equities of prior parties existing at the time of

[1] The thirty-fourth section of this act provides, that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States."

[2] 16 Pet. 1. And see, to like effect, Carpenter v. Providence-Washington Ins. Co., 16 Pet. 495.

[3] Oates v. First National Bank, 100 U. S. 239.

the transfer, should be followed.[1] But the court say of their own doctrine: "We perceive no reason for its modification in any degree whatever. We could not infringe upon it, in this case, without disturbing or endangering that stability which is essential to be maintained in the rules of commercial law. The decisions of the New York court which we are asked to follow, in determining the rights of parties under a contract there made, are not in exposition of any legislative enactment of that state. They express the opinion of that court, not as to the rights of parties under any law local to that state, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one state, or dependent upon local authority, but one arising out of the usages of the commercial world. Suppose a state court, in a case before it, should determine what were the laws of war as applicable to that and similar cases. The federal courts sitting in that state possessing, it must be conceded, equal power with the state court in the determination of such questions, must, upon the theory of counsel for the plaintiff in error, accept the conclusions of the state court as the true interpretation, for that locality, of the laws of war, and as the 'law' of the state in the sense of the statute which makes the 'laws of the state rules of decision in trials at common law.' We apprehend, however, that no one would go that far in asserting the binding force of state decisions upon the courts of the United States, when the latter are required, in the discharge of their judicial functions, to consider questions of general law arising in suits to which their jurisdiction extends. To so hold would be to defeat one of the objects for which those courts were established, and introduce infinite confusion in their decisions of such questions."

§ 110. **That an existing debt is a valuable and sufficient consideration** is the established doctrine in all the federal courts.[2] "On a subject of such general importance, and con-

[1] Railroad Co. v. National Bank, 102 U. S. 14, 31.

[2] Oates v. First Nat. Bank, 100 U. S. 239; Wood v. Seitzinger, 2 Fed. Rep.

cerning which there can not properly be a local rule, and in which the commercial world has a common interest, uniformity and certainty of decision are greatly to be desired; and since the highest tribunals of this country and in England are ruling in harmony upon the point, a state court can hardly be justified in adopting, if, indeed, in adhering to, a different rule."[1]

§ 111. **The rule upon this subject having the preponderance of authority and resting upon the better reasons** is, that a person to whom negotiable paper is indorsed before maturity as collateral security is a *bona fide* holder for value, although he receive it as security for an existing debt.[2] The English de-

843, 14 Am. Law Rev. 503. In a note to this case in the Review, Mr. Biddle carefully and critically examines the cases, and in conclusion says: "It is, perhaps, not for an annotator of a case to express his opinion as to what the better rule is, but we can not help feeling the weight of the practical reasoning of those judges who have followed the dictum of Story, J., in Swift v. Tyson, as well as that of that learned jurist himself, and thinking that the more reasonable and practical rule which puts on the circulation of commercial paper as little restraint as possible." National Bank of the Republic v. Brooklyn City & Newtown R. Co., 14 Blatchf. 242, affirmed 102 U. S. 14. In Mack v. Baker, 5 Weekly Notes Cas. 212, Cadwalader, Dist. J., followed the Pennsylvania doctrine to the contrary, but this decision was overruled in the same district in Wood v. Seitzinger, 2 Fed. Rep. 843, 14 Am. Law Rev. 503.

[1] Straughan v. Fairchild, 80 Ind. 598, per Woods, J.

[2] This is the doctrine in the following states:

In re Wiley, 4 Biss. 171.

California: Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318; Robinson v. Smith, 14 Cal. 94; Neglee v. Lyman, 14 Cal. 458; Sackett v. Johnson, 54 Cal. 107; Davis v. Russell, 52 Cal. 611, 28 Am. Rep. 647; Frey v. Clifford, 44 Cal. 335, 342.

Connecticut: Brush v. Scribner, 11 Conn. 388, 29 Am. Dec. 303; Savings Bank v. Bates, 8 Conn. 505, 507; Bridgeport City Bank v. Welch, 29 Conn. 475; Roberts v. Hall, 37 Conn. 205, 9 Am. Rep. 308; Osgood v. Thompson Bank, 30 Conn. 27.

Delaware: Bush v. Packard, 3 Harr. 385.

Georgia: Gibson v. Conner, 3 Ga. 47; Bond v. Central Bank, 2 Ga. 92, 106; Meadow v. Bird, 22 Ga. 246; Bonaud v. Genesi, 42 Ga. 639.

Illinois: Hancock v. Hodgson, 3 Scam. 329; Mayo v. Moore, 28 Ill. 428; Manning v. McClure, 36 Ill. 490; Butters v. Haughwout, 42 Ill. 18, 89 Am. Dec. 401; Bowman v. Millison, 58 Ill. 36; Doolittle v. Cook, 75 Ill. 354, 359; Worcester Nat. Bank v. Cheeney, 87 Ill. 602; Mix v. Nat. Bank, 91 Ill. 20, 33 Am. Rep. 44; McIntire v. Yates, 104 Ill. 491.

cisions seem to be unanimous in holding that current negotiable paper, taken as collateral security for a prior debt, is taken

Indiana: Spencer v. Sloan, 108 Ind. 183, 9 N. E. Rep. 150; Straughan v. Fairchild, 80 Ind. 598, 14 Cent. L. J. 413; Valette v. Mason, Smith 89, 1 Ind. 288; Work v. Brayton, 5 Ind. 396; Rowe v. Haines, 15 Ind. 445, 77 Am. Dec. 101; Babcock v. Jordan, 24 Ind. 14; McKnight v. Knisely, 25 Ind. 336, 87 Am. Dec. 364.

Iowa: Tomblin v. Callen, 69 Iowa 229, 28 N. W. Rep. 573; Robinson v. Lair, 31 Iowa 9.

Louisiana: Giovanovich v. Citizens' Bank, 26 La. Ann. 15; Succession of Dolhonde, 21 La. Ann. 3; Louisiana State Bank v. Gaiennie, 21 La. Ann. 555; Smith v. Isaacs, 23 La. Ann. 454.

Maryland: Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; Cecil Bank v. Heald, 25 Md. 563.

Massachusetts: Blanchard v. Stevens, 3 Cush. 162, 1 Am. Dec. 723; Chicopee Bank v. Chapin, 8 Met. 40; Culver v. Benedict, 13 Gray 7; Stoddard v. Kimball, 6 Cush. 469; Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74; Merriam v. Granite Bank, 8 Gray 254; Gardner v. Gager, 1 Allen 502; Paine v. Furnas, 117 Mass. 290; Fisher v. Fisher, 98 Mass. 303; Le Breton v. Pierce, 2 Allen 8; Woodruff v. Hill, 116 Mass. 310; National Revere Bank v. Morse, 163 Mass. 383, 40 N. E. Rep. 180; Goodwin v. Massachusetts Loan & T. Co., 152 Mass. 189, 199, 25 N. E. Rep. 100; Spaulding v. Kendrick, 172 Mass. 71, 51 N. E. Rep. 453; Merchants' Nat. Bank v. Haverhill Iron Works, 159 Mass. 158, 34 N. E. Rep. 93.

Michigan: Bostwick v. Dodge, 1 Doug. 413, 41 Am. Dec. 584; Outhwaite v. Porter, 13 Mich. 533.

Mississippi: In Fellows v. Harris, 12 S. & M. 462, the court approved the reasoning in Swift v. Tyson, but stated in the case before them that there was a new consideration.

Missouri: Boatman's Sav. Inst. v. Holland, 38 Mo. 49; Grant v. Kidwell, 30 Mo. 455; but *contra*, see Goodman v. Simonds, 19 Mo. 106; Brainard v. Reavis, 2 Mo. App. 490.

New Hampshire: Williams v. Little, 11 N. H. 66; Whitcher v. Dexter, 61 N. H. 91.

New Jersey: Allaire v. Hartshorne, 1 Zab. 665, 47 Am. Dec. 175; Armour v. McMichael, 36 N. J. L. 92.

New York: Negotiable Instruments Act, Laws 1897.

North Carolina: Reddick v. Jones, 6 Ired. 107, 44 Am. Dec. 68.

Pennsylvania: Beckhaus v. Commercial Nat. Bank (Pa.), 12 Atl. Rep. 72.

Rhode Island: Bank of Republic v. Carrington, 5 R. I. 515, 523, 73 Am. Dec. 83; Cobb v. Doyle, 7 R. I. 550.

South Carolina: Bank of Charlestown v. Chambers, 11 Rich. 657.

Texas: Alexander v. Bank of Lebanon (Tex.), 47 S. W. Rep. 840; Brown v. Thompson, 79 Tex. 58, 15 S. W. Rep. 168; Liddell v. Crain, 53 Tex. 549; Herman v. Gunter, 83 Tex. 66, 18 S. W. Rep. 428; Heffron v. Cunningham, 76 Tex. 312, 13 S. W. Rep. 259; Kauffman v. Robey, 60 Tex. 308. In Greneaux v. Wheeler, 6 Tex. 515, part of the consideration was an antecedent debt, and the court said that the current of authorities went to show that a note was taken in the *bona fide* course of trade when transferred on such consideration.

Vermont: People's Nat. Bank v. Clayton, 66 Vt. 541, 29 Atl. Rep. 1020; Noyes v. Landon, 59 Vt. 569, 10

for value, and in the usual course of business.[1] Lord Campbell, in giving the opinion in Poirier v. Morris, said: "There is nothing to make a difference between this and the common case, where a bill is taken as security for a debt due; and in that case an antecedent debt is a sufficient consideration."

§ 112. **The ground upon which one taking negotiable paper as collateral security for a pre-existing debt becomes a holder for value** may be stated to be, that he becomes such a holder by the very act of receiving of the paper, and becoming a party to it in such a way that the duty is imposed upon him of making presentment and giving notice of dishonor.[2] Thus, where a promissory note was pledged to a bank to secure an existing debt, the Supreme Court of the United States upon this point, through Mr. Justice Harlan, said:[3] "The bank did not take

Atl. Rep. 342; Atkinson v. Brooks, 26 Vt. 569, 62 Am. Dec. 592; Dixon v. Dixon, 31 Vt. 450, 76 Am. Dec. 129; Michigan State Bank v. Leavenworth, 28 Vt. 209; Russell v. Splatter, 47 Vt. 273; Quinn v. Hard, 43 Vt. 375, 5 Am. Rep. 284.

Virginia: Negotiable Instruments Acts, 1898.

West Virginia: Hotchkiss v. Fitzgerald Plaster Co., 41 W. Va. 357, 23 S. E. Rep. 576.

In the following named states the Negotiable Instruments Act, a uniform law enacted at the dates stated, provides that "an antecedent or pre-existing debt constitutes value":

Colorado, 1897, Laws 1897, p. 217, § 25; *Connecticut,* 1897, Pub. Acts 1897, p. 786, § 25; *District Columbia,* 1899; *Florida,* 1897, Laws 1897, p. 31, § 25; *Maryland,* 1898, Laws 1898, p. 213, § 44; *Massachusetts,* 1898, Acts and Resolves 1898, c. 533, § 25; *North Carolina,* 1899, Pub. Laws 1899, c. 733, § 25; *North Dakota,* 1899, Laws 1899, c. 113, § 25; *New York,* 1897, Laws 1897, c. 612, § 51; *Oregon,* 1899, Laws 1899, p. 22, § 25; *Rhode Island,* 1899, Laws 1899, c. 674, § 33; *Tennessee,* 1899, Acts 1899, c. 94, § 25; *Utah,* 1899, Laws 1899, c. 83, § 25; *Virginia,* 1898, Acts 1898, c. 866, § 25; *Washington,* 1899, Laws 1899, c. 149, § 25; *Wisconsin,* 1899, Laws 1899, c. 356, § 1675–51.

[1] Poirier v. Morris, 2 El. & Bl. 89, 20 L. & Eq. 103; Percival v. Frampton, 2 Cromp. M. & R. 180; Bosanquet v. Dudman, 1 Stark. 1; Heywood v. Watson, 4 Bing. 496, 1 M. & P. 268; Price v. Price, 16 M. & W. 232; Currie v. Misa, L. R. 10 Ex. 153. In Swift v. Tyson, 16 Pet. 1, the Supreme Court, after reviewing the English cases, say: "They directly establish that a *bona fide* holder, taking a negotiable note *in payment of, or as security for,* a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties."

[2] See Massachusetts, Rhode Island, and other cases, before cited.

[3] Railroad Co. v. National Bank, 102 U. S. 14, 27.

the note in suit as a mere agent to receive the amount due when it suited the convenience of the debtor to make payment. It received the note under an obligation imposed by the commercial law to present it for payment, and give notice of non-payment, in the mode prescribed by the settled rules of that law. We are of opinion that the undertaking of the bank to fix the liability of prior parties by due presentation for payment, and due notice in case of non-payment,—an undertaking necessarily implied by becoming a party to the instrument,—was a sufficient consideration to protect it against equities existing between the other parties of which it had no notice. It assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position." Taking this broad ground, it is not necessary to resort to any express or implied condition on the part of the creditor to suspend the remedy upon his debt.

§ 113. **It is true, also, that forbearance on the part of the creditor to act is a good consideration.** If the creditor had not taken the collateral note, he might have pursued other remedies to enforce the payment of the debt; or he might have obtained other security, or perhaps the money. It is a fallacy, therefore, to say that if the creditor be not allowed to enforce his collateral note, he is nevertheless in as good a situation as he would have been in if the collateral had not been transferred to him. "That fact is assumed, and not proved, and from the very nature of the case is a matter of entire uncertainty. The convenience and safety of those dealing in negotiable paper seems to require and justify the rule, that when a person takes a negotiable note not overdue, or apparently dishonored, and without notice, actual or constructive, of the want of consideration, or other defense thereto, whether in payment for a precedent debt, or as collateral security for a debt, the holder should have the legal right to enforce the same against the parties thereto, notwithstanding such defense might have been effectual as between the original parties."[1]

[1] Blanchard v. Stevens, 3 Cush. (Mass.) 162, 169, 1 Am. Dec. 723, per Dewey, J.; Smith v. Mott, 76 Cal. 171, 18 Pac. Rep. 260; Nott v. State Nat.

There are cases which seem to rest on the ground that the taking of a negotiable security payable at a future day implies an agreement by the creditor to suspend his remedies during that period, and that this implied agreement constitutes the true consideration for the taking and holding of the collateral paper.[1]

Bank, 51 La. Ann. 871, 25 So. Rep. 475.

[1] See, for instance, Atkinson v. Brooks, 26 Vt. 569, 2 Am. Dec. 592; Redfield, C. J., said: "It seems to me, the ordinary case of taking such a security as payment, or as collateral to the prior debt, is the same in principle. One whose debt is due, in the commercial world, must pay it instantly, or he becomes a bankrupt. If, instead of money, he gives a bill or note, either on time or at sight, whether this is in form in payment, or collateral to his debt, he gains time, and saves the disgrace and ruin consequent upon stopping payment. And, in either case, there is an implied undertaking that he shall wait upon his debtor till the result of the new security can be known; and in both cases, when that proves unproductive, the creditor may pursue his original debt; . . . and it is scarcely supposable that one so taking security for a debt will not conduct differently on account of the security. It is of necessity he should, if he puts any confidence in its ultimate availability. And one would scarcely part with such security, unless he expected more or less indulgence on account of it." These views were, however, criticised and rejected in the later case of Austin v. Curtis, 31 Vt. 64, in a careful opinion by Bennett, J. In Manning v. McClure, 36 Ill. 490–496, Lawrence, J., said: "It is urged that in the absence of such new consideration, or any such agreement, the indorsee is in no worse condition than he would have been if he had not received the note, even though the maker is permitted to set up any defense that he could have made against the payee. This is the chief argument of those authorities which decide against the claim of the indorsee. But is this true, as a matter of fact? If the indorsee expressly give further time on his original debt, it is admitted he is to be protected. But it is assumed that, if he does not expressly agree to give time, he does not *in fact* give it,—he does not forbear to use remedies that he would have used but for the security. Now, the question is of one presumption, and that presumption must be drawn from the experience of society. The question is, in the absence of any express agreement, what we must presume to have been the implied understanding of the parties, at the time of the indorsement, in regard to further forbearance, to be inferred from the nature of the transaction, and the objects which both parties had in view. We have no hesitation in saying that the assumption that time is not in fact given, because it is not expressly agreed to be given, and that therefore the indorsee is not placed in a worse position by letting in the latent equities than he would have occupied if he had not received the note, is at variance with the general experience of all men whose business makes them cognizant of affairs of this character." See, also, Currie v. Misa, L. R. 10 Ex. 153, 163, 1 App. Cas. 554.

But it is not conceived it is necessary to resort to this ground to find a sufficient consideration to support a valid title in a creditor who has taken a bill or note as security for an existing debt.

A grant of a definite extension of the time of payment of a debt is a valuable consideration for the giving of collateral security, and the pledgee is a holder for value of such security, although the debt is a pre-existing one; and this doctrine is held in states in which a pre-existing debt is not regarded as a sufficient consideration to constitute the pledgee a holder for value of collateral negotiable paper.[1]

§ 114. **The taking of negotiable paper as security for an existing debt is as much in the usual course of trade and business,** and as much for a valuable consideration, as is an absolute transfer of such an instrument in payment of such a debt, or in payment or security of a debt created at the time. "It certainly would seem that payment of existing debts should be in the usual course of business; and where it is inconvenient that debts shall be paid, it ought not to be out of the usual course of business that such debts should be secured, if security be asked. The indorsing over of a note for the purpose of paying a debt ought to be held as much for valuable consideration as the transferring it for a new purchase; and the indorsing over of such a note for securing a debt heretofore contracted, as for one presently incurred. * * * On the ground of importance for commercial purposes, we do not see why negotiable instruments should not have credit and currency for the payment of and for securing debts, as well as for the purchasing of goods or the raising of cash.'"[2]

§ 115. **In some American courts a distinction is taken between a note taken in payment and one indorsed as security** for a pre-

[1] Atlanta Guano Co. v. Hunt, 100 Tenn. 89, 42 S. W. Rep. 482; Cherry v. Frost, 7 Lea (Tenn.) 1.

[2] Bank v. Carrington, 5 R. I. 515, per Bosworth, J. To same effect, see Roberts v. Hall, 37 Conn. 213, 9 Am. Rep. 308, per Carpenter, J.

existing debt; moreover, a distinction is taken between paper taken in *absolute* payment of a pre-existing debt, and paper taken in nominal payment of such a debt. The equities of antecedent parties do not prevail against the holder in the former case, but they do prevail against the holder in the latter case. Generally when paper is spoken of as received in payment of a debt, it is meant that it is received in conditional or nominal payment; for it is regarded as so received when there is no evidence of an intention to receive the paper in absolute discharge and satisfaction, beyond what may be inferred from the ordinary transaction of accepting or receipting it in payment, or crediting it on account. The payment under such circumstances is regarded as conditional only, and the right of the creditor to proceed upon the original indebtedness after the maturity of the paper is unimpaired.[1] But the surrender by a creditor of the past due notes of a debtor upon receiving from him, in good faith, before maturity, the note of a third person, in place of the note surrendered, constitutes the creditor a holder for value of the note thus taken, and protects him against the defenses and equities of the antecedent parties, and it is immaterial whether the note surrendered was given to the creditor for goods sold, or money loaned, or under circumstances which would leave the original debt, represented by the note in existence, enforcible against the debtor, or whether, by surrendering the note, the creditor parted with his entire right of action.[2] It may indeed be considered as settled, except in New York,[3] that, when a negotiable instrument is

[1] Phœnix Ins. Co. v. Church, 81 N. Y. 218, 37 Am. Rep. 494, 42 Am. Rep. 610; Potts v. Mayer, 74 N. Y. 594; Hunter v. Moul, 98 Pa. St. 13; Mercur, J., in this case said: "The mere acceptance, from a debtor, of his own note, or the note of a third person, in case of an antecedent indebtedness, is not a payment of the indebtedness. In the absence of a special agreement, it must be considered as a conditional payment or as collateral security. The debtor continues liable for his own debt in the event of a failure of payment of the note thus given or transferred." Citing several Pennsylvania cases.

[2] Such is the result of the New York cases, as stated by Andrews, J., in Phœnix Ins. Co. v. Church, 81 N. Y. 218, 225, 37 Am. Rep. 494, after a review of a long line of authorities.

[3] Turner v. Treadway, 53 N. Y. 650; Lawrence v. Clark, 36 N. Y. 128;

taken in payment of a pre-existing debt, it is held discharged

Weaver v. Barden, 49 N. Y. 286, per Allen, J.; Fisher v. Sharpe, 5 Daly 214; Ayres v. Leypoldt, 6 Daly 91; Buhrman v. Baylis, 14 Hun 608; Rosa v. Brotherson, 10 Wend. 85; Payne v. Cutler, 13 Wend. 605; Stalker v. M'Donald, 6 Hill 93, 40 Am. Dec. 389; White v. Springfield Bank, 1 Barb. 225, 3 Sandf. 222. But one receiving a note indorsed *without recourse*, in payment of a precedent debt which is at the same time discharged, is a *bona fide* holder for value, not subject to any equities between the original parties. Bank of St. Albans v. Gilliland, 23 Wend. 311, 35 Am. Dec. 566; Bank of Sandusky v. Scoville, 24 Wend. 115; Mohawk Bank v. Corey, 1 Hill 513; Youngs v. Lee, 12 N. Y. 551; Brown v. Leavitt, 31 N. Y. 113; Chrysler v. Griswold, 43 N. Y. 209; Gould v. Segee, 5 Duer 260; Purchase v. Mattison, 6 Duer 587, 3 Bosw. 310; White v. Springfield Bank, 3 Sandf. 222; Stettheimer v. Meyer, 33 Barb. 215. See, also, Hoyt v. Hoyt, 8 Bosw. 511; Paddon v. Taylor, 44 N. Y. 371; Pratt v. Coman, 37 N. Y. 440, Brown v. Leavitt, 31 N. Y. 113; Bigelow Bills and Notes, 499, where the result of the New York cases on this point is fully stated. And so one taking a note in exchange for a note *not then due*, which is thereupon surrendered, is a holder for value. Youngs v. Lee, 12 N. Y. 551. But the old note must be surrendered absolutely before maturity. Bright v. Judson, 47 Barb. 29. Later cases established the doctrine that it is immaterial whether the surrendered note be past due or not. Phœnix Ins. Co. v. Church, 81 N. Y. 218, 37 Am. Rep. 494; Pratt v. Coman, 37 N. Y. 440; Clothier v. Adriance, 51 N. Y. 322; Paddon v. Taylor, 44 N. Y. 371; Brown v. Leavitt, 31 N. Y. 113; Day v. Saunders, 1 Abb. App. Dec. 495.

But this distinction is not a sound one. On the contrary, when paper is taken in conditional payment of an existing debt, if an agreement be not necessarily implied to forbear the collection of the existing debt until the maturity of the new paper, the condition that the debt shall revive if the new paper be not paid amounts to the same thing.

Upon this point see Currie v. Misa, L. R. 10 Ex. 153, 163, where the title of a creditor who had taken a check on account of an existing debt was held to be indefeasible, on the ground that it was a conditional payment. Lush, J., said: "The title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that given by the Court of Common Pleas in Belshaw v. Bush, 11 C. B. 191, as the foundation of the judgment in that case; namely, that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized. This is precisely the effect which both parties intended the security to have; and the doctrine is as applicable to one species of negotiable security as to another—to a check payable on demand, as to a running bill or promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person. The security is offered to the creditor, and taken by him as money's worth, and justice requires that it should be as truly his property

of equities existing between prior parties;[1] yet some of the courts so holding also hold that a creditor to whom such paper is indorsed as security for a pre-existing debt takes it subject to the equities between the antecedent parties.[2]

as the money which it represents would have been his had the payment been made in gold or a Bank of England note. And, on the other hand, until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, and to sue the debtor as if he had no security."

[1] Bank of the Republic v. Carrington, 5 R. I. 515, 73 Am. Dec. 83, per Bosworth, J.; Conkling v. Vail, 31 Ill. 166; Foy v. Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Draper v. Cowles, 27 Kan. 484.

[2] Thus, in *Iowa*, it is held that a note transferred in satisfaction of a pre-existing debt is transferred for a valuable consideration; Johnson v. Barney, 1 Iowa 531; while one transferred as collateral security for such a debt does not give the indorsee the rights of a holder for value. Keokuk Co. State Bank v. Hall, 106 Iowa 540, 76 N. W. Rep. 832; Bone v. Tharp, 63 Iowa 223, 18 N. W. Rep. 906; Union Nat. Bank v. Barber, 56 Iowa 559, 9 N. W. Rep. 890; Iowa College v. Hill, 12 Iowa 462; Ruddick v. Lloyd, 15 Iowa 441, 83 Am. Dec. 423. So in *Kentucky:* Alexander v. Springfield Bank, 2 Metc. 535; Lee v. Smead, 1 Metc. 628, 634; May v. Quimby, 3 Bush 96; Greenwell v. Haydon, 78 Ky. 332; and *Pennsylvania:* Bardsley v. Delp, 88 Pa. St. 420; Dovey's App., 97 Pa. St. 153; Muirhead v. Kirkpatrick, 21 Pa. St. 237; Kirkpatrick v. Muirhead, 16 Pa. St. 117, 123; Bell, J., in the latter case, saying: "Whatever contrariety of opinion may have existed elsewhere on this subject, it is the undoubted law of Pennsylvania that though the holder of a negotiable instrument received in *payment* of a pre-existing debt, before maturity, can not be subjected to equities which might have furnished a defense as between the original parties, and of which he had no notice, yet, if the paper be taken as *collateral security merely*, for the payment of a debt, or for protection against previously assumed liabilities, the defendant may aver any ground of defense which would have been competent between antecedent parties to the bill or note; unless, indeed, there was some new and distinct consideration moving between the parties to the transfer—such as giving up some other available security, releasing another party, drawer or indorser, conceding further time for payment, and the like." And see Struthers v. Kendall, 41 Pa. St. 214, 80 Am. Dec. 610. So in *Maine:* Norton v. Waite, 20 Me. 175; Homes v. Smyth, 16 Me. 177, 33 Am. Dec. 650; *Mississippi:* Harris v. Lombard, 60 Miss. 29; Montgomery v. McGuire, 59 Miss. 193; Craft v. Bloom, 59 Miss. 169; Surget v. Boyd, 57 Miss. 485; *New Hampshire:* Williams v. Little; 11 N. H. 66; *Wisconsin:* Heath v. Silverthorn Lead Mining and Smelting Co., 39 Wis. 146; Bange v. Flint, 25 Wis. 544; De Witt v. Perkins, 22 Wis. 473; Stevens v. Campbell, 13 Wis. 375; Cook v. Helms, 5 Wis. 107; Knox v. Clifford, 38 Wis. 651, 20 Am. Rep. 28; Atchison v. Davidson, 2 Pinney 48; Shufeldt v. Pease, 16 Wis. 659; and *Alabama:* Mayberry v. Morris, 62 Ala. 113; Vann v. Marbury, 100

§ 116. **This distinction seems shadowy and pernicious.** "The indorsing over of a note for the purpose of paying a debt ought to be held as much for valuable consideration as the transferring it for a new purchase; and the indorsing over of such a note for securing a debt heretofore contracted as for one presently incurred. It is held by the courts, with scarcely any exception, that the transferring of a note to secure payment for a present purchase is in the usual course of business. And why is it not so when transferred to secure a debt due, and which ought to be paid or secured before new liabilities are contracted? On the ground of importance for commercial purposes, we do not see why negotiable instruments should not have credit and currency for the payment of, and for securing debts, as well as for the purchasing of goods or the raising of cash. It is often quite as important to business men in commercial transactions that they should be able to pay or secure their debts, and make use of current paper for these purposes, as it is that they should make new purchases, or sell such paper sometimes at ruinous sacrifices, for the purpose of raising money with which to pay their debts."[1]

There is, in fact, no difference in principle between a note indorsed in payment and one indorsed for the security of a pre-existing debt; and the courts generally place them upon the same footing.[2]

§ 117. **The doctrine that an assignee of negotiable paper as collateral security for a pre-existing debt is not a holder for**

Ala. 438, 14 So. Rep. 273; First Nat. Bank v. Johnston, 97 Ala. 655, 11 So. Rep. 690.

[1] Bank of the Republic v. Carrington, 5 R. I. 515, 521, per Bosworth, J., 73 Am. Dec. 83. In Riley v. Anderson, 2 McLean 589, Judge McLean said: "On principle and authority, the New York decisions on this point are wholly unsustainable. The payment of a debt, it is to be hoped, has not yet become an act 'out of the ordinary course of business.'" And see Carlisle v. Wishart, 11 Ohio 172.

[2] See cases *supra*, and Meadow v. Bird, 22 Ga. 246, 254; Gibson v. Conner, 3 Ga. 47; Butters v. Haughwout, 42 Ill. 18, 89 Am. Dec. 401; Giovanovich v. Citizens' Bank, 26 La. Ann. 15; Atkinson v. Brooks, 26 Vt. 569, 576, 62 Am. Dec. 592, per Redfield, C. J.

value,[1] stated at length, is as follows: The assignee of negotia-

[1] This doctrine prevails in—

Alabama: Fenouille v. Hamilton, 35 Ala. 319, 322; Boyd v. Beck, 29 Ala. 703; McKenzie v. Branch Bank, 28 Ala. 606, 65 Am. Dec. 369; Connerly v. Planters' and Merchants' Ins. Co., 66 Ala. 432; Lehman v. Tallassee Manuf. Co., 64 Ala. 567.

Arkansas: Bertrand v. Barkman, 13 Ark. 150.

Iowa: Iowa College v. Hill, 12 Iowa 462; Ruddick v. Lloyd, 15 Iowa 441, 83 Am. Dec. 423; Davis v. Strohm, 17 Iowa 421; Ryan v. Chew, 13 Iowa 589. But see § 111.

Kentucky: Lee v. Smead, 1 Metc. 628; Alexander v. Springfield Bank, 2 Metc. 534; May v. Quimby, 3 Bush 96; Breckinridge v. Moore, 3 B. Mon. 629.

Maine: Bramhall v. Beckett, 31 Me. 205; Nutter v. Stover, 48 Me. 163; Smith v. Bibber, 82 Me. 34, 19 Atl. Rep. 89.

Minnesota: Becker v. Sandusky City Bank, 1 Minn. 311, 319.

Mississippi: Brooks v. Whitson, 7 S. & M. 513.

Missouri: Goodman v. Simonds, 19 Mo. 106; Logan v. Smith, 62 Mo. 455; Davis v. Carson, 69 Mo. 609.

New Hampshire: Williams v. Little, 11 N. H. 66; Jenness v. Bean, 10 N. H. 266, 34 Am. Dec. 152; Fletcher v. Chase, 16 N. H. 38; Rice v. Raitt, 17 N. H. 116.

New York: Coddington v. Bay, 20 Johns. 637, 5 Johns. Ch. 54, 11 Am. Dec. 342; Francia v. Joseph, 3 Edw. Ch. 182; Stalker v. M'Donald, 6 Hill 93, 40 Am. Dec. 389; Wardell v. Howell, 9 Wend. 170; Lawrence v. Clark, 36 N. Y. 128; Weaver v. Barden, 49 N. Y. 286, 294, per Allen, J.; Beers v. Culver, 1 Hill 589; Scott v. Betts, Hill & Den. 363; Stewart v. Small, 2 Barb. 559; Farrington v. Frankfort Bank, 24 Barb. 554, 31 Barb. 183; Prentiss v. Graves, 33 Barb. 621; American Exch. Bank v. Corliss, 46 Barb. 19; Furniss v. Gilchrist, 1 Sandf. 53; Skilding v. Warren, 15 Johns. 270; Small v. Smith, 1 Denio 583; Turner v. Treadway, 53 N. Y. 650; Moore v. Ryder, 65 N. Y. 438; Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142; Stevens v. Brennan, 79 N. Y. 254, 258.

This rule was finally changed by statute in 1897, Negotiable Instruments Act. See § 111, *n.*

North Carolina: In Reddick v. Jones, 6 Ired. 107, Ruffin, C. J., 44 Am. Dec. 68, who delivered the opinion of the court, was somewhat doubtful as to what the rule should be, but intimated that the holder of a note as collateral was not a *bona fide* holder for value.

Ohio: Roxborough v. Messick, 6 Ohio St. 448, 67 Am. Dec. 346; recognized in Rezner v. Hatch, 7 Ohio St. 248, 255; Gebhart v. Sorrels, 9 Ohio St. 461, 466; Cleveland v. State Bank, 16 Ohio St. 236, 269, 88 Am. Dec. 445; Copeland v. Manton, 22 Ohio St. 398, 402; Pitts v. Foglesong, 37 Ohio St. 676, 680, 41 Am. Rep. 540.

Pennsylvania: Ashton's Appeal, 73 Pa. St. 153; Schaeffer v. Fowler, 111 Pa. St. 451, 2 Atl. Rep. 558; Carpenter v. National Bank of Republic, 106 Pa. St. 170; Altoona Second Nat. Bank v. Dunn, 151 Pa. St. 228, 25 Atl. Rep. 80; Royer v. Keystone Nat. Bank, 83 Pa. St. 248; Depeau v. Waddington, 6 Whart. 220, 36 Am. Dec. 216; Cummings v. Boyd, 83 Pa. St. 372; Kirkpatrick v. Muirhead, 16 Pa. St. 117, 123; Lord v. Ocean Bank, 20 Pa. St. 384, 59 Am. Dec. 728; Sitgreaves v. Farmers' and Mechanics' Bank, 49 Pa. St. 359; Lenheim v.

ble paper, receiving it in good faith from the payee, without notice, and before maturity, as collateral security for a pre-existing debt, in the absence of any new consideration, stipulation for delay or credit given, or right parted with by the creditor, is not a holder of the collateral paper for value, in the usual course of trade, but takes it subject to all the equities which may exist against the payee in favor of the maker at the time of the assignment.[1] This doctrine has no application when any new consideration enters into the transaction; such, for instance, as an additional loan or advancement made at the time, a new responsibility incurred, or a stipulation for delay or credit, or a change of securities. In all such or similar cases the holder of the collateral security is protected from infirmities affecting the instrument before it was thus transferred.[2]

§ 118. **This doctrine rests upon two objections:** 1. That a creditor who has paid no new consideration for his collateral

Wilmarding, 55 Pa. St. 73; Pratt's Appeal, 77 Pa. St. 378; Petrie v. Clark, 11 S. & R. 377, 14 Am. Dec. 636; Oakford v. Johnson, 2 Miles 203; Jackson v. Polack, 2 Miles 362; Maynard v. Sixth Nat. Bank, 98 Pa. St. 250.

Tennessee: Wormley v. Lowry, 1 Humph. 468; Kimbro v. Lytle, 10 Yerg. 417, 31 Am. Dec. 5; Nichol v. Bate, 10 Yerg. 429; Napier v. Elam, 6 Yerg. 108; King v. Doolittle, 1 Head 77; Craighead v. Wells, 8 Baxt. 38; Atlanta Guano Co. v. Hunt, 100 Tenn. 89, 42 S. W. Rep. 482; McRady v. Thomas, 16 Lea 173.

Virginia: Prentice v. Zane, 2 Gratt. 262. This case is referred to in the later case of Davis v. Miller, 14 Gratt. 1, 16, as the only case in that state bearing upon this subject, and seems to have been based upon the supposed correctness of the New York rule. "The note in that case was made in Philadelphia; and the decision conformed to the well settled law of the place of the contract. Whether the case would have been decided in the same way if the note had been a Virginia contract is uncertain. The question may therefore be considered as still unsettled in this state." Per Moncure, J.

The rule was changed by statute in this state, Negotiable Instruments Act 1898. See § 111, *n.*

Wisconsin: Bowman v. Van Kuren, 29 Wis. 209, 19 Am. Rep. 554; Body v. Jewsen, 33 Wis. 402; Jenkins v. Schaub, 14 Wis. 1; Cook v. Helms, 5 Wis. 107.

[1] Ruddick v. Lloyd, 15 Iowa 441, 83 Am. Dec. 423; Iowa College v. Hill, 12 Iowa 462; Roxborough v. Messick, 6 Ohio St. 448, 67 Am. Dec. 346.

[2] Ruddick v. Lloyd, 15 Iowa 441, 83 Am. Dec. 423; Stotts v. Byers, 17 Iowa 303; Nelson v. Edwards, 40 Barb. (N. Y.) 279; Traders' Bank v. Bradner, 43 Barb. (N. Y.) 379; Cherry v. Frost, 7 Lea (Tenn.) 1.

note is not injured by an impeachment of his title to it. 2. That the collateral note is not one made in the usual course of business.

Both of these objections have been repeatedly and conclusively answered. They were answered by Mr. Justice Story in Swift v. Tyson,[1] one of the earliest of the American cases upon this subject; and they were answered again in the latest case involving this subject in the same court;[2] and these answers can not be better stated than in the authoritative language of the judges who delivered the opinions in those cases. 1. "Transfers of negotiable securities for the purpose supposed are seldom made, except in the execution of some agreement or understanding by which the transferrer is to be benefited, as by delay or forbearance or further credit, or the giving up of other collaterals, or the substitution of one collateral for another, or the promise to forego the means of obtaining other indemnity or security. Few cases, it is presumed, arise where the interest of the debtor is not consulted; so that, if the rule should be confined to the cases falling within the abstract theory of such a defense, the question would cease to be of much importance; nor would it often be true that, if the title of the holder should be impeached, he would be left in as good condition as he was before."[3] 2. As to the objection that a transfer of negotiable paper as collateral security for an existing debt is not a transaction in the ordinary course of business, Mr. Justice Harlan, delivering the opinion of the court, said:[4] "This objection is not sustained by the recognized usages of the commercial world, nor, as we think, by sound reason. The transfer of negotiable paper as security for antecedent debts constitutes a material and an increasing portion of the commerce of the country. Such transactions have become very common in financial circles. They have grown out of the necessities of business, and, in these days of

[1] 16 Pet. 1.

[2] Railroad Co. v. National Bank, 102 U. S. 14, 51.

[3] Per Clifford, J., in Railroad Co. v. National Bank, 102 U. S. 14.

[4] Railroad Co. v. National Bank, 102 U. S. 14.

great commercial activity, they contribute largely to the benefit and convenience both of debtors and creditors."

§ 119. **In the exceptional case where no agreement for time can be implied** from the taking of a collateral note, we have already seen that the supreme court find a sufficient consideration to uphold the pledge in the duties and undertakings on the part of the pledgee in becoming a party to the note.[1] Mr. Justice Bradley, however, declared that he did not regard the obligation assumed by the pledgee to present the note for payment, and give notice of non-payment, as the only, or the principal, consideration of such transfer: "The true consideration was the debt due from the indorsers to the indorsee, and the obligation to pay or secure said debt. Had any other collateral security been given, as a mortgage, or a pledge of property, it would have been equally sustained by the consideration referred to, namely, the debt and the obligation to pay it or secure its payment. * * * But the *bona fide* transfer of commercial paper before maturity does cut off such equities; and every collateral is held by the creditor of such title and in such manner as appertains to its nature and qualities. Security for the payment of a debt actually owing is a good consideration, and sufficient to support a transfer of property. When such transfer is made for such purpose, it has due effect as a complete transfer, according to the nature and incidents of the property transferred. When it is a promissory note or bill of exchange, it has the effect of giving absolute title and of cutting off prior equities, provided the ordinary conditions exist to give it that effect. If not transferred before maturity, or in due course of business, then, of course, it can not have such effect. But I think it is well shown in the principal opinion that a transfer for the purpose of securing a debt is a transfer in due course. And that really ends the argument on the subject."

§ 120. **In conclusion, it is to be observed** that the innovation in commercial law made by the decision in Bay v. Cod-

[1] Railroad Co. v. National Bank, 102 U. S. 14, 58.

dington, and followed to the present time by the courts of several states, seems unlikely to obtain general recognition as a rule founded in sound reason and good policy. It has found no recognition in England. Mr. Justice Clifford, of the Supreme Court, in a recent case,[1] referring to Bay v. Coddington and other cases in New York, which have followed the rule of law there announced, said: "Sixty years have elapsed since the commercial rule adopted and enforced by that series of decisions was first promulgated, and yet it does not and never has commanded the slightest countenance from any court sitting in Westminster Hall. Earnest differences of opinion existed in that country among judicial men, in respect to the extent of the protection which the commercial law afforded to a *bona fide* holder of a negotiable security against the equities between the antecedent parties, but there is no authentic evidence that any substantial diversity of opinion ever arose in the courts of that country touching the question under consideration." The Supreme Court, by its recent decisions, has conclusively affirmed its former doctrine upon this subject, and has made this the settled rule of law to be followed by all federal courts, regardless of the local doctrine to the contrary which may prevail in any state where a federal court may be sitting. It is unlikely that the courts of any state not already committed to the doctrine of Bay v. Coddington will hereafter adopt it, in opposition to the established doctrine of the federal courts, followed also by the greater number of the state courts. The federal courts will, in fact, sooner or later, compel the general adoption of the doctrine by those courts.

§ 121. **Uniformity of rule upon this subject is so important** in the every-day business of the people, that the existence of a conflicting rule is an evil which will some day become too great to be longer tolerated; and uniformity will be reached by legislation, or by adoption of the prevailing doctrine by the courts. In a former decision by the Supreme Court of Indiana it was wisely said:[2] "If this court were not, as it seems to be,

[1] Railroad Co. v. National Bank, 102 U. S. 14, 44.

[2] Straughan v. Fairchild, 80 Ind. 598, 14 Cent. L. J. 413.

already committed to the doctrine held by the Supreme Court of the United States, we should be much inclined, if not constrained, to follow it. On a subject of such general importance, and concerning which there can not properly be a local rule, and in which the commercial world has a common interest, uniformity and certainty of decision are greatly to be desired; and since the highest tribunals in this country and in England are ruling in harmony upon the point, a state court can hardly be justified in adopting, if, indeed, in adhering to a different rule."

§ 122. **Exception as to accommodation paper.** The doctrine that a pre-existing debt is not a valuable consideration for a pledge of a promissory note is applied by some of the courts which adopt it to accommodation paper, holding that, in a suit by an indorsee of such paper for a precedent debt, the maker may successfully interpose the defense that it was originally given without value.[1] But the weight of authority among the courts which adopt this general doctrine is, that the holder of an accommodation note, made without restriction as to its use, and taken in good faith as collateral security for an antecedent debt, and without other consideration, is entitled to the position of a holder for value, and is not affected by the defense of want of consideration to the maker.[2] It is only where

[1] Bramhall v. Beckett, 31 Me. 205; Connerly v. Planters' & Merchants' Ins. Co., 66 Ala. 432.

[2] *New York:* Grocers' Bank v. Penfield, 7 Hun 279, aff'd 69 N. Y. 502, 25 Am. Rep. 231; Cole v. Saulpaugh, 48 Barb. 104; East River Bank v. Butterworth, 45 Barb. 476, 30 How. Pr. 444, 51 N. Y. 637; Grandin v. LeRoy, 2 Paige 509; Bank of Rutland v. Buck, 5 Wend. 66; White v. Springfield Bank, 3 Sandf. 222; Lathrop v. Morris, 5 Sandf. 7; DeZeng v. Fyfe, 1 Bosw. 335; Robbins v. Richardson, 2 Bosw. 248; Grant v. Ellicott, 7 Wend. 227; Agawam Bank v. Strever, 18 N.Y. 502; Youngs v. Lee, 12 N. Y. 551; Ross v. Bedell, 5 Duer 462, 467; Purchase v. Mattison, 6 Duer 587; Harrington v. Dorr, 3 Rob. 275; Inglis v. Kennedy, 6 Abb. Pr. 32; Seneca County Bank v. Neass, 5 Den. 329, 3 N. Y. 442; Ross v. Whitefield, 1 Sweeny 318; Pettigrew v. Chave, 2 Hilt. 546; Montross v. Clark, 2 Sandf. 115; Schepp v. Carpenter, 49 Barb. 542, 51 N. Y. 602; Freund v. Importers' & Traders' Nat. Bank, 76 N. Y. 352, 358. *Ohio:* Pitts v. Foglesong, 37 Ohio St. 676, 680, 41 Am. Rep. 540.

In the case of Powers v. French, 1 Hun (N. Y.) 582, 4 T. & C. 65, hold-

the note has been diverted from the purpose for which it was intrusted to the payee, or some other equity exists in favor of the maker, that it is necessary that the holder should have parted with value on the faith of the note, in order to cut off such equity of the maker.[1] Moreover, when the holder of such a note has parted with a valuable consideration for it, the mere fact that it has been fraudulently diverted from the purpose for which it was made is no defense to his action upon it; to make such defense available, it must be shown that the holder had notice of the restriction imposed in regard to the use of the note.[2]

§ 123. **It does not matter that the person who takes negotiable paper as collateral security has notice that it was made for the debtor's accommodation.** Upon this point the Supreme Court of Illinois in a recent case said: "Accommodation paper is made for the express purpose that it may be sold or negotiated for the benefit of the person accommodated, and after it has been sold or negotiated in the usual course of business for value, the maker will not be listened to if he asserts it was without consideration. It is a reasonable rule, that one who puts his note or bill in the hands of another to be sold or negotiated, after it is done, will not be permitted to answer the holder, who has taken it in good faith for value, that he does not owe the note or bill. The very purpose of making accommodation paper is, that the party favored may dispose of it, and unless restricted he may transfer it either before or after maturity, and the maker will be equally bound. The usage in this regard is sanctioned by the practice that has

ing that one taking accommodation paper, knowing it to be such, and without parting with anything upon the faith of the transfer, can not recover, there was no antecedent debt to support the transfer.

[1] Moore v. Ryder, 65 N. Y. 438; Spencer v. Ballou, 18 N. Y. 327, 331; Bank of Rutland v. Buck, 5 Wend. (N. Y.) 66. And see Crandall v. Vickery, 45 Barb. (N. Y.) 156.

[2] *New York:* Merchants' Nat. Bank of Syracuse v. Comstock, 55 N. Y. 24; Boyd v. Cummings, 17 N. Y. 101; Essex Co. Bank v. Russell, 29 N. Y. 673; Bank of New York v. Vanderhorst, 32 N. Y. 553; First Nat. Bank v. Hall, 44 N. Y. 395, 4 Am. Rep.

prevailed in mercantile transactions everywhere in this country and in England. That usage has now the consistence of law. Any other rule would permit the maker of such paper to practice a fraud on persons who should take paper he had put out to be negotiated in the usual course of business. The only safe rule is, that where a bill or note is given, with no restriction as to the mode or time of using it by the party accommodated, and the same has been transferred in good faith in the usual course of business, the holder, if he paid a valuable consideration for it, will be entitled to recover the full amount, although he may have had full knowledge it was accommodation paper. The authorities on this branch of the law are consistent and numerous."[1]

§ 124. **An accommodation note may be effectually pledged for an antecedent debt.** "When a person gives another an accommodation note, it contains an authority to use it in the payment of an existing debt, to sell or discount it, or, if more to his interest, to pledge it as a collateral security for money advanced at the time, or before advanced, or on a running account between the parties, for money advanced before, at the time, or afterward. In short, he has the complete control to use it, as the name imports, for his own benefit or accommodation, in any manner he may judge best calculated to advance his own interest. If he can prevent a suit against him, by pledging the note intentionally drawn in the usual commercial form, and intended to be used without restriction, and by this means preserve his credit, there is nothing, either in law or

698; Park Bank v. Watson, 42 N. Y. 490; Mason v. Hickox, 11 Abb. Pr. N. S. 127; Platt v. Beebe, 57 N. Y. 339. *Vermont:* Quinn v. Hard, 43 Vt. 375, 5 Am. Rep. 284; Dixon v. Dixon, 31 Vt. 450, 76 Am. Dec. 129. *Maryland:* Maitland v. Citizens' Nat. Bank, 40 Md. 540, 561, 17 Am. Rep. 620.

[1] Miller v. Larned, 103 Ill. 562, 570; Tucker v. Jenckes, 5 Allen (Mass.) 330; Holmes v. Beniss, 25 Ill. App. 232, 124 Ill. 453, 17 N. E. Rep. 42; Hodges v. Nash, 43 Ill. App. 638, 141 Ill. 391, 31 N. E. Rep. 151; Newbold v. Boraef, 155 Pa. St. 227, 26 Atl. Rep. 305; Cottrell v. Watkins, 89 Va. 801, 17 S. E. Rep. 328; People's Nat. Bank v. Clayton, 66 Vt. 541, 29 Atl. Rep. 1020; Arnold v. Sprague, 34 Vt. 402.

morals, to prevent him. Of what consequence is it to the maker whether he sells the note, gives it as a collateral security for a debt already contracted, or for money advanced at the time of the transaction? Accommodation paper is a loan of the credit of the maker to the extent of the value of the note, for the benefit of the payee, without restriction."[1]

The maker of accommodation paper must abide his liability, and has no more right to complain that the payee accommodates himself by pledging it for an old debt, than he has if he uses it in any other way.[2]

The ground upon which accommodation paper may be pledged as collateral for an existing debt is declared in the Pennsylvania cases to be merely because it is a loan of credit without restriction,[3] and not because the pledgee is a purchaser for value, for he is not such a purchaser;[4] therefore, such paper may be impeached in his hands for fraud in its making or procurement,—such, for instance, as a false and fraudulent representation by the payee for whose accommodation the note was made, that he was worth, above all liabilities, a hundred thousand dollars or more, when, in fact, he was insolvent; or his fraud in promising to fill up an accommodation note signed in blank, for a sum not exceeding six hundred dollars, but actually making it fourteen hundred dollars.[5]

A pledgee of accommodation paper, taking it with knowledge of an agreement between the parties to it that it should be dis-

[1] Appleton v. Donaldson, 3 Pa. St. 381.

[2] Lord v. Ocean Bank, 20 Pa. St. 384, 59 Am. Dec. 728; Work v. Kase, 34 Pa. St. 138; Moore v. Baird, 30 Pa. St. 138; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 562, 17 Am. Rep. 620; Pitts v. Foglesong, 37 Ohio St. 676, 681, 41 Am. Rep. 540.

[3] Cummings v. Boyd, 83 Pa. St. 372; Ashton's Appeal, 73 Pa. St. 153; Hutchinson v. Boggs, 28 Pa. St. 294.

[4] *Pennsylvania:* Cases in preceding note, and Petrie v. Clark, 11 S. & R. 377, 14 Am. Dec. 636; Irwin v. Tabb, 17 S. & R. 419; Hartman v. Dowdel, 1 Rawle 279, 282; Twelves v. Williams, 3 Whart. 485, 31 Am. Dec. 542; Depeau v. Waddington, 6 Whart. 220, 36 Am. Dec. 216; Trotter v. Shippen, 2 Pa. St. 358; Ludwig v. Highley, 5 Pa. St. 132, 139; Kirkpatrick v. Muirhead, 16 Pa. St. 117, 123, 21 Pa. St. 237; Garrard v. Pittsburgh & Connelsville R. Co., 29 Pa. St. 154, 160; Pittsburgh & Connelsville R. Co. v. Barker, 29 Pa. St. 160.

[5] Cummings v. Boyd, 83 Pa. St. 372.

counted and the proceeds used in a specified way, is bound by such agreement.[1]

§ 125. **But equities arising between the original parties subsequently to the indorsement** of paper to a creditor can not be set up as a defense to his action against the maker.[2] The test to determine whether the note is subject to an equity set up by the maker is found in the inquiry whether the payee, at the time he transferred the note, could have maintained a suit upon it against the maker had it then matured.[3]

§ 126. **Equities arising from independent transactions.** Under this rule, all equities between the parties to the collateral note are not let in against a creditor who has taken it as security for a pre-existing debt; but only such as pertain to the collateral note itself. Equities arising from other than independent transactions are not available to the maker against such assignee.[4]

§ 127. **If the creditor at the time of receiving a collateral note parts with anything of value,** either money, property, or existing securities, upon the faith of such note, he thereby becomes a holder for value.[5]

Of course a surrender of collateral securities previously given, or affording increased indulgence as to time, is a sufficient consideration for an assignment of negotiable paper by way of new collateral.[6] A note transferred to a judgment

[1] People's Nat. Bank v. Clayton, 66 Vt. 541, 29 Atl. Rep. 1020.

[2] Becker v. Sandusky City Bank, 1 Minn. 311; McSpedon v. Troy City Bank, 2 Keyes (N. Y.) 35, 3 Abb. Dec. 133.

[3] Furniss v. Gilchrist, 1 Sandf. (N. Y.) 53; Elwell v. Dodge, 33 Barb. (N. Y.) 336.

[4] Ryan v. Chew, 13 Iowa 589.

[5] Bank of New York v. Vanderhorst, 32 N. Y. 553; Weaver v. Barden, 49 N. Y. 286, 293; Belmont Bank v. Hoge, 35 N. Y. 65; Brown v. Leavitt, 31 N. Y. 113; Essex Co. Bank v. Russell, 29 N. Y. 673; Boyd v. Cummings, 17 N. Y. 101; Youngs v. Lee, 12 N. Y. 551; Logan v. Smith, 62 Mo. 455.

[6] Goodman v. Simonds, 20 How. 343; Park Bank v. Watson, 42 N. Y. 490, 1 Am. Rep. 573; Brown v. Leavitt, 31 N. Y. 113; White v. Springfield Bank, 3 Sandf. (N. Y.) 222; American Exchange Nat. Bank v. New York Belting & P. Co., 148 N. Y. 698, 43 N. E. Rep. 168.

creditor as security for the payment of the judgment, and in consideration of his discontinuing proceedings supplementary to execution then pending against the debtor, is supported by a sufficient consideration.[1]

§ 128. **The authorities concur in the rule that, where there is any change in the legal rights of the parties in relation to the antecedent debt,** the creditor taking the collateral security is considered a holder for value, and the paper is not subject to equities existing between the original parties.[2] Upon this ground it was held in California that a statute which deprived the holder of collateral security of his remedy against the principal debtor by attachment, so changed the legal right of the creditor in respect to the antecedent debt as to make him a holder for value, and protect him from equitable defenses;[3] although in that state, upon general principles of mercantile law, commercial paper, transferred before maturity as collateral security for a pre-existing debt, is not subject to the defenses open to the maker against the payee.[4]

§ 129. **Agreement for further time.** Under this doctrine, although the real purpose of a debtor in giving collateral security be to gain further time for the payment of his debt, this purpose will not avail as a consideration, unless there be a definite agreement for delay. Thus, where paper was pledged as additional security for a loan already due, for the purpose of obtaining further time, but no definite extension was agreed upon, and there was no valid agreement for forbearance, the creditor was held not to be a *bona fide* holder for value.[5] The mere fact that the creditor, after receiving collateral security, grants indulgence, or forbears to enforce his demand, does not

[1] Boyd v. Cummings, 17 N. Y. 101.

[2] Naglee v. Lyman, 14 Cal. 450, 454, per Field, C. J.

[3] Naglee v. Lyman, 14 Cal. 450; Payne v. Bensley, 8 Cal. 260; 68 Am. Dec. 318.

[4] Robinson v. Smith, 14 Cal. 94, 24 Am. Dec. 212; Coit v. Humbert, 5 Cal. 260, 63 Am. Dec. 128.

[5] Atlantic Nat. Bank v. Franklin, 55 N. Y. 235; reversing 64 Barb. 449; Gahn v. Niemcewiez, 11 Wend. (N.Y.) 312; Whitney v. Goin, 20 N. H. 354; Body v. Jewsen, 33 Wis. 402.

prove that such indulgence or forbearance was an element of the contract, or was the consideration for giving the security. Forbearance without any agreement to forbear is a voluntary act, and is not a consideration for the giving of security.[1]

The right to enforce the original debt is regarded as suspended when the creditor, taking collateral security, expressly agrees to keep the original obligation until the collateral is paid or becomes due.[2] Such an agreement is in effect one not to enforce the original bill in the meantime. And such, also, is the effect of receiving a second bill or note in renewal of the first; for the creditor then virtually undertakes not to enforce the first.[3]

§ 129a. **Time becomes of the essence of the contract for an extension of the time of payment, when the terms of the extension are definite.** A debtor and his creditor executed a written agreement, by which certain securities were to be placed in the hands of a trustee for collection, with a provision that if a certain sum with interest, less than the amount of the debt secured, should be paid by a day named, the trustee was to apply the sums collected on the securities to the payment of the amount due upon the notes, and account to the debtor for the surplus. The creditor also covenanted that, if said sum was paid to him on or before the day named, he would not sue the debtor upon the notes. The debtor did not pay the sum named in the agreement within the time therein specified. Afterwards the trustee collected a certain sum upon the securities held by him, and paid to the creditor a sum which was less than the amount due upon the notes. It was held on a bill in equity by the creditor against the debtor and trustee to enforce the trust created by the agreement, that time was of the essence of the contract, that oral evidence was in-

[1] Fenouille v. Hamilton, 35 Ala. 319, 323; Vann v. Marbury, 100 Ala. 438, 14 So. Rep. 273; Pittsburgh & Connelsville R. Co. v. Barker, 29 Pa. St. 160.

[2] Gould v. Robson, 8 East 576; Price v. Dime Sav. Bank, 124 Ill. 317, 15 N. E. Rep. 754.

[3] Kendrick v. Lomax, 2 Crompt. & J. 405.

admissible to show any intention or understanding of the parties other than that expressed in the contract; and that the creditor had not lost his right to have the money collected upon the securities applied in payment of the notes, by not demanding payment of the debtor or bringing suit against him upon the notes.[1]

§ 130. **Merely taking collateral security does not suspend the right of action upon the debt.** Aside from the doctrine that an antecedent debt is not a valid consideration for a transfer of collateral security, it is held, with reference to the discharge of a surety or indorser upon the original debt, that no binding agreement to delay the collection of the debt can be implied from the creditor's taking a promissory note, or other obligation payable at a future time, as collateral security; and therefore, the taking of such security does not have the effect to discharge the surety, unless there be a binding contract to suspend the right of action upon the original debt.[2]

§ 130a. **A legal extension of the time of payment of a debt must be supported by sufficient consideration paid.** The mere indulgence on the part of a pledgee by a promise to extend the time of the principal debt, or by his conduct in regard to it, does not effect a change in the duties and obligations of the parties to each other as prescribed by the original contract of pledge. But the extension of the time for the payment of a debt, which must be supported by a sufficient consideration, must not be confused with a waiver of the right to forfeit the pledge without previous notice to the pledgor or those who represented

[1] Ames v. Brooks, 143 Mass. 344, 9 N. E. Rep. 737.

[2] Pring v. Clarkson, 1 B. & C. 14; Twopenny v. Young, 3 B. & C. 208; Emes v. Widdowson, 4 C. & P. 151; United States v. Hodge, 6 How. 279; Wallace v. Agry, 4 Mason 336; Ripley v. Greenleaf, 2 Vt. 129; Day v. Leal, 14 Johns. (N. Y.) 404; Bank of Utica v. Ives, 17 Wend. (N. Y.) 501; Elwood v. Deifendorf, 5 Barb. (N. Y.) 398, 409; James v. Badger, 1 Johns. (N. Y.) Cas. 131; Hurd v. Little, 12 Mass. 502; Ruggles v. Patten, 8 Mass. 480; Sigourney v. Witherell, 6 Met. (Mass.) 553, 564; Weakly v. Bell, 9 Watts (Pa.) 280, 36 Am. Dec. 116; Burke v. Cruger, 8 Tex. 66, 58 Am. Dec. 102; Norton v. Eastman, 4 Greenl. (Me.) 521.

him, or were interested in the pledge. The right to sue upon the debt may not have been affected by the negotiations, but it does not follow that this is true with respect to the right to dispose of the pledge without notice. Thus where the original contract, under which a policy of life insurance is pledged as collateral security for the payment of a promissory note, permits a sale, public or private, or otherwise, or a surrender of the policy to the company issuing it, without notice to the pledgor, the right of the pledgee to so dispose of it upon default in payment of the note, may be waived by any agreement, declaration or course of conduct on his part which leads the pledgor to believe that a forfeiture will not be insisted upon without an opportunity given him to redeem, and no new or independent consideration is required to support the waiver; and if, having waived his right to a strict performance of the contract, the pledgee surrenders the policy to the company, without notice, he is liable for the damages occasioned thereby in an action of conversion; and in such an action, the plaintiff is not obliged to show affirmatively that he could have raised the money to pay the note at the time of the conversion if notice had been given.[1]

§ 131. **Usurious agreement for extension.**—A creditor who takes a negotiable note before maturity, so indorsed that he becomes a party to the instrument, as collateral security for a pre-existing debt, under a binding contract for indulgence, is, according to the law merchant, a holder for value, and his rights can not be affected by equities between antecedent parties, of which he had no notice.[2] When there is such a consideration, it does not matter that there enters into the consideration for the extension a payment of usurious interest, for the period of extension, so that the consideration becomes in part legal, and in part vicious. The former is itself sufficient

[1] Toplitz v. Bauer, 161 N. Y. 325, 55 N. E. Rep. 1059, affirming 34 App. Div. 526.

[2] Oates v. First Nat. Bank, 100 U. S. 239, 12 Chicago L. N. 119, 9 Rep. 97; Goodman v. Simonds, 20 How. 343, 353, per Clifford, J.

to sustain the contract of extension and transfer of the collateral note, and to constitute the creditor a holder for value. Upon this point the Supreme Court of the United States will not follow the decisions of the courts of the state in which the case arose, holding that one taking a note in violation of the statute against usury shall not be regarded as a *bona fide* holder for value;[1] for the question is one of general commercial law, upon which the courts of the United States are not bound by the decisions of the local courts.[2]

A contract for the extension of the time of payment of a debt is none the less binding because it was induced by a payment of usurious interest in advance. Although the taking of usurious interest may subject the creditor to certain forfeitures prescribed by law, and to an action by the debtor for the recovery of the amount so paid by him, it does not enable the creditor to avoid the contract for indulgence.[3]

§ 132. **Cases in which negotiable paper is taken by a creditor as conditional payment of a precedent debt** have sometimes been distinguished from those in which it is taken merely as collateral security.[4] If, for instance, the holder of a promissory note at its maturity accepts from the maker a check, dated ahead, and drawn by the maker's firm, with the agreement that the check, if paid at maturity, is to be in full satisfaction of the note, the remedy against the maker is thereby suspended, and an accommodation indorser is discharged.[5] "The law is clear," said Lord Kenyon,[6] "that if in payment

[1] Oates v. First Nat. Bank, 100 U. S. 239; 12 Chic. L. N. 119, 9 Rep. 97.

[2] Oates v. First Nat. Bank, 100 U. S. 239, 12 Chic. L. N. 119, 9 Rep. 97.

[3] Saltmarsh v. Tuthill, 13 Ala. 390, 410; Carlisle v. Hill, 16 Ala. 398, 406.

[4] Kearslake v. Morgan, 5 T. R. 513; Clark v. Young, 1 Cranch 181—the latter not consistent with Weakly v. Bell, 9 Watts (Pa.) 273, 280, 36 Am. Dec. 116.

[5] Okie v. Spencer, 2 Whart. (Pa.) 253, 30 Am. Dec. 251. The reasoning of Kennedy, J., in giving the decision, is open to objection. See Austin v. Curtis, 31 Vt. 64, 73. And see Myers v. Welles, 5 Hill (N. Y.) 463; Fellows v. Prentiss, 3 Denio (N. Y.) 512, 45 Am. Dec. 484. See Currie v. Misa, L. R. 10 Ex. 153, for the case of a conditional payment by check on account.

[6] Stedman v. Gooch, 1 Esp. 3.

of a debt the creditor is content to take a bill or note payable at a future day, he can not legally commence an action on his original debt until such bill or note becomes payable." The distinction between the two classes of cases above referred to is well stated by Judge Bennett in Austin v. Curtis.[1] "As I understand the cases, there is a class of securities, payable on time, the taking of which on an antecedent debt implies an agreement for the suspension of the antecedent debt; but that class of cases is confined to those where the creditor accepts the note or bill for and on account of the antecedent debt, and the new security, for the time being, at least, is to take the place of and represent the original debt. That class is distinguishable from, and not to be confounded with, the class where the creditor has accepted simply a new additional or collateral security for an antecedent debt. In the former transaction, an agreement to give time may be implied, but not out of the latter transaction. There the new security is held only as a pledge, leaving the creditor with the right to enforce the old security whenever he shall see fit to withdraw any expected indulgence to the principal, and at the same time leaving to the surety the right of coming into a court of equity at any time for relief. * * * I apprehend the distinction in the cases is well taken, and that while an agreement to give time may be implied in the case where the new security takes the place of, and stands, for the time being, in lieu of the old security; yet, if the new security is but additional and collateral to the old, I think it may well be said that the fact of taking the new security on time does not prove a promise to give time, but doubtless may furnish ground for an expected indulgence which the principal debtor is bound to treat as being, at all times, countermandable at the will of the creditor."

§ 133. **The transaction is governed by the law of the place where the pledge is made.** Thus, if a broker in New York, to

[1] 31 Vt. 64, 75; overruling the cases of Atkinson v. Brooks, 26 Vt. 569, 62 Am. Dec. 592, and Michigan State Bank v. Leavenworth, 28 Vt. 209, so far as they conflict.

whom negotiable securities are intrusted to raise money upon for the owner, deliver them, as security for a pre-existing debt of his own, in Massachusetts, or any other state, by the law of which the receiving of a negotiable note as security for a pre-existing debt excludes all equities between the original parties, the transfer must be dealt with according to the law of Massachusetts, or such other state; and the pledgee taking such securities in good faith before maturity obtains a good title to them to the amount of the debt for which they are pledged.[1] If, on the other hand, a negotiable note be delivered in New York as collateral security for a precedent debt, the transaction is governed by the law of that state; and in a suit upon such note in another state, where the rule is that one taking paper as security for a precedent debt is a holder for value in the usual course of business, the law of New York, that such a transfer does not constitute one a holder for value, must be applied.[2]

[1] Culver v. Benedict, 13 Gray (Mass.) 7.

[2] Russell v. Buck, 14 Vt. 147.

CHAPTER IV.

PLEDGES OF NON-NEGOTIABLE CHOSES IN ACTION.

I. *The Effect of such Pledges.*

§ 134. **Non-negotiable securities are always subject in the hands of a pledgee to existing equities.** Thus, a pledgee of a non-negotiable demand, such as a certificate of the amount due a person on account, can transfer to another only the same rights as the owner parted with when he assigned it; he transfers it subject to all the rights and equities of the owner, unless the latter is by his acts estopped from asserting them. If the owner of such a demand indorse in blank a certificate of the amount, and pledge it for a loan, and the pledgee sells the certificate in this form to another, the purchaser takes only the interest of the pledgor, and must surrender the claims upon receiving the amount of such loan.[1]

But in this same case it would seem that if the pledgee had written an absolute assignment of the demand to himself over the blank indorsement of the owner, as he was virtually authorized to do by an indorsement in this form, and had then himself sold the demand in this form to a purchaser for value in good faith, the latter would have acquired a good title to the whole demand. The owner would have been estopped by his

[1] Cowdrey v. Vandenburgh, 101 U. S. 572.

own act from asserting any title as against such purchaser. This estoppel arises from the well-settled principle that when the owner of property in any form clothes another with the apparent title or power of disposition, and third persons are thereby induced to deal with him, they are entitled to full protection.[1]

§ 135. **A bona fide purchaser for value of a non-negotiable chose in action,** from one upon whom the owner has, by assignment, conferred the apparent absolute ownership, obtains a valid title as against the real owner, who is estopped from asserting a title in hostility thereto. Although the pledgor in such case has not transferred a legal title, having conferred the apparent ownership, he is precluded from asserting his title against a *bona fide* purchaser from such apparent owner; for, the purchase having been made upon the faith of the title which the owner had apparently given, it would be contrary to justice and good conscience to permit him to assert his real title against the purchaser. Moreover, it would open the door for fraud upon purchasers of such property, if the owner, after transferring it by an absolute written transfer, were permitted to come in and assert his title against one dealing upon the faith of such transfer: the dishonest might combine and practice the grossest frauds.[2] Again, the maxim that, where one of two innocent parties must sustain a loss from the fraud of a third, such loss should fall upon the one whose act has enabled such fraud to be committed, is applicable in such cases.[3]

If the payee of a non-negotiable certificate of deposit indorse it in blank, and deliver it as security for a loan, the pledgee

[1] Cowdrey v. Vandenburgh, 101 U. S. 572, per Field, J.

[2] Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173; overruling Bush v. Lathrop, 22 N. Y. 535. Question raised but not passed upon in Talty v. Freedman's Savings & Trust Co., 93 U. S. 321. The chose in action in Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, was a certificate of indebtedness of the state of New York for $10,000, assigned as follows: "For value received, I hereby transfer, assign, and set over to Isaac Miller the within-described amount, say ten thousand dollars."

[3] Moore v. Metropolitan Nat. Bank, 55 N. Y. 41; Fullerton v. Sturges, 4 Ohio St. 529.

may make a valid pledge of the certificate to an innocent party, who will hold it without reference to the equities between the payee and his pledgee. The last pledgee is authorized to infer absolute ownership and full right in the holder to pledge the certificate; though, as against the payee, his recovery would be limited to the amount of his loan upon the certificate.[1]

A recital, however, in an assignment of a chose in action by the apparent owner, that it was made for value received, is not evidence in favor of the assignee against the real owner that it was for value, although he himself introduce the assignment in evidence. The assignee must prove affirmatively that he is a *bona fide* purchaser for value.[2]

§ 135a. **A contract may be assigned in pledge.** A contract for the construction of a sea-wall and wharf assigned by the contractor as collateral security, accompanied by a power of attorney to the assignee to collect the money to become due under the contract, is merely a pledge of the contract, creating a lien thereon, subject to which the title and general property in the pledge remains in the pledgor; and such pledge and lien imply no obligation on the part of the pledgee to perform or to pay for the work which the pledged contracts required to be performed by the pledgors, and the pledgee is not liable to an action of assumpsit by employes of the pledgors for work and labor performed.[3]

A cause of action for the recovery of the value of property

[1] International Bank v. German Bank, 71 Mo. 183, 36 Am. Rep. 468; Weirick v. Mahoning Co. Bank, 16 Ohio St. 296; and also Combes v. Chandler, 33 Ohio St. 178.

[2] Moore v. Metropolitan Nat. Bank, 55 N. Y. 41.

[3] Stone v. Owens, 105 Cal. 292, 38 Pac. Rep. 726. So a contract for the sale of land. Butler v. Rockwell, 14 Colo. 125, 23 Pac. Rep. 462. So an order for wages due the pledgor. Lewis v. Commissioners, 14 Colo. 371, 23 Pac. Rep. 338. So a contract for the construction of a railroad. Reynolds v. Louisville, New Albany & Chicago R. Co., 143 Ind. 579, 40 N. E. Rep. 410. A lease of real property for a term of years. Penney v. Lynn, 58 Minn. 371, 59 N. W. Rep. 1043. A legacy or an interest in the estate of a deceased person. McKie v. Gregory, 175 Mass. 505, 56 N. E. Rep. 720.

entrusted to a carrier is assignable and may therefore be pledged.[1] And so in an action for the recovery of money obtained by false pretenses or wrongfully converted.[2]

One having a lien upon property may assign the lien as collateral security, and may maintain an action for its enforcement, making the assignee of the lien a party; or the assignee may enforce it in the name of the assignor.[3]

Book accounts may be pledged by an assignment of them, but a mere statement of the accounts is not a pledge of them.[4]

The fact that one who has made a loan upon an indorsed note is induced by the maker or indorsers to take further collateral security which is forbidden by a rule of public policy, such as an assignment by the maker of future fees to accrue from the county to him as a public officer, does not affect the lender's right to enforce the note against the maker or the indorsers. The latter are not discharged because the collateral was illegal.[5]

A cause of action for a personal tort can not be assigned, and therefore can not be pledged.[6]

§ 136. **The assignment of a chose in action as security is valid without notice to the debtor** of the assignment. The assignment is complete upon the mutual assent of the parties to it, followed by delivery; and it does not gain additional validity as against third persons by notice to the debtor.[7]

§ 136a. **An assignment by a contractor as security for a debt of all moneys to become due to him from a city, is not rendered**

[1] Merrill v. Grinnell, 30 N. Y. 594.

[2] Byxbie v. Wood, 24 N. Y. 607; McKee v. Judd, 12 N. Y. 622, 64 Am. Dec. 515.

[3] Ridgway v. Bacon, 72 Hun (N. Y.) 211, 25 N. Y. Supp. 651, 55 N. Y. St. Rep. 345.

[4] Cornwell v. Baldwin's Bank, 12 App. Div. 227, 43 N. Y. Supp. 771; Freeman v. Rich, 64 Hun (N. Y.) 478, 19 N. Y. Supp. 498, 46 N. Y. St. Rep. 731.

[5] Bowery Bank v. Gerety, 153 N. Y. 411, 47 N. E. Rep. 793, affirming 91 Hun 539, 36 N. Y. Supp. 254. See Oneida Bank v. Ontario Bank, 21 N. Y. 490; Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 45 N. E. Rep. 390.

[6] Zabriskie v. Smith, 13 N. Y. 322, 334, 64 Am. Dec. 551; People v. Tioga, 19 Wend. (N. Y.) 73.

[7] Thayer v. Daniels, 113 Mass. 129. Otherwise in *England:* Dearle v. Hall, 3 Russ. 1; Loveridge v. Cooper, 3 Russ. 30; Meux v. Bell, 1 Hare 73.

void by a provision in the contract against assignment, such as a provision that neither the contract nor any of the moneys payable under it shall be assigned without the consent of the city in writing, but is for the protection of the city, and can be availed of only by the city; a junior assignee of the moneys can not avail himself of this provision to obtain a more favorable position in the order of payment. When an assignment, in form an absolute assignment of all the contractor's rights and interest under such a city contract, is in fact made as collateral security for a debt, the assignee, in the distribution of the fund payable under the contract and where no claim is made against the city, comes within the rule that, as between different assignees of a chose in action by express agreement from the same person, the one prior in point of time will be protected, although he has given no notice of such assignment to either the subsequent assignee or the debtor.[1]

II. *Pledges of Mortgages.*

§ 137. **A mortgage with the note or bond secured by it may be the subject of a pledge** by the mortgagee or holder. Though the transfer be by an absolute assignment, yet if it be accompanied by the debtor's note, which gives his creditor authority to sell the mortgage upon the debtor's default in paying his debt, the transaction is a pledge of the mortgage, and not a sale or mortgage of it.[2] The assignee in such a case has only a special property in the mortgage, and is subject to all the duties and obligations of a pledgee. Thus, if such assignee without demand or notice transfer the mortgage to a third person for a grossly inadequate price, and the latter cancels it, the creditor is liable to his debtor in trover for a conversion of the mortgage.[3]

[1] Fortunato v. Patten, 147 N. Y. 277, 41 N. E. Rep. 572; Lowry v. Inman, 46 N. Y. 119; Williams v. Ingersoll, 89 N. Y. 508; Fairbanks v. Sargent, 104 N. Y. 108, 9 N. E. Rep. 870, 117 N. Y. 320, 22 N. E. Rep. 1039.

[2] Campbell v. Parker, 9 Bosw. (N. Y.) 322; Haskins v. Kelly, 1 Rob. (N. Y.) 160, 1 Abb. Pr. N. S. 63.

[3] Campbell v. Parker, 9 Bosw. (N. Y.) 322.

In some early cases an assignment of a bond or note and mortgage is spoken of as in itself a mortgage.[1] "Whether a particular transaction is a mortgage or a pledge is often a very nice question; and being a question of difficulty, courts have in many instances used the terms 'mortgage' and 'pledge' indifferently, when it was not necessary to observe the distinction between them. But when the real character of the transaction is manifested by the language of the parties to the contract, disclosing their purpose and intention, all that a court has to do is to recognize its real and true character, and to carry into effect by an appropriate decree the parties' declared intention."[2] Accordingly a note and mortgage may be the subject of either a pledge or a chattel mortgage.

§ 138. **If the form of the assignment of a chose in action be that of a mortgage** of it with a condition of defeasance, the transaction, in the absence of any other decisive characteristic, should be regarded as a mortgage rather than a pledge. Thus, if a life insurance policy be assigned by an instrument having throughout the form of a mortgage, or if the assignment on the one side and the receipt on the other, taken together, are such in form, the purport and substance of the contract, and the intention of the parties as disclosed by the language used to express it, indicate a mortgage rather than a pledge.[3]

§ 139. **To institute a valid pledge of a mortgage or other lien, there must be either a legal transfer** by signing and delivering a written assignment of it, or there must be some other actual or symbolical delivery of possession; such for instance as the delivery of the mortgage and note, or the note alone. A mere agreement of the parties that there shall be a pledge of the mortgage, without any such transfer or delivery,

[1] Henry v. Davis, 7 Johns. (N. Y.) Ch. 40, 2 Cow. 324; Slee v. Manhattan Co., 1 Paige (N. Y.) 48.

[2] Wright v. Ross, 36 Cal. 414, 429, per Currey, C. J., and see Dungan v. Mut. Benefit L. Ins. Co., 38 Md. 242, 252, per Miller, J.

[3] Dungan v. Mut. Benefit L. Ins. Co., 38 Md. 242.

is insufficient.[1] The same rule applies to the pledge of any other like security; such for instance as a policy of insurance. A contract or promise to transfer or deliver it in pledge does not avail to make it a pledge unless it be transferred or delivered in pursuance of such contract or promise.[2]

§ 140. **An ordinary absolute assignment of a mortgage with the note, made by way of security for another debt, is a pledge** rather than a mortgage. Probably such a transfer would generally, in the absence of controlling circumstances, be regarded as a pledge.[3] But there may be a mortgage of a mortgage, and this is the legal effect of an assignment of a mortgage, upon the express condition that the assignment shall be void, if default be made by the assignor in the payment of the draft secured by the assignment. An assignment of a note and mortgage of real property made in the usual form of a chattel mortgage, expressed to be for the purpose of securing a sum of money, and providing that if the assignee collects the money he is to account for any surplus there may be, may be regarded as a chattel mortgage, especially if the instrument be so denominated in the terms of it.[4]

§ 141. **Generally the fact that a mortgage is assigned as collateral security does not appear on the face of the assignment.** If the assignment be absolute in form, the fact that it was made as collateral security may be shown by parol evidence, just as an absolute conveyance of real property may by such evidence be shown to be a mortgage; or as an absolute bill of sale may be shown to be a mortgage or pledge of personal property.

[1] Sevin v. Caillouet, 30 La. Ann. 528; Caffin v. Kirwan, 7 La. Ann. 221.

[2] Succession of D'Meza, 26 La. Ann. 35.

[3] Fraker v. Reeve, 36 Wis. 85. See, also, Gay v. Moss, 34 Cal. 125, where an absolute assignment of a contract was so regarded.

[4] Wright v. Ross, 36 Cal. 414. And see Dewey v. Bowman, 8 Cal. 145, 150; Wendell v. New Hampshire Bank, 9 N. H. 404.

In an assignment of a mortgage as collateral security, a recital of the consideration is not alone constructive notice that the assignee holds the mortgage as security for that sum. Thus where a mortgage, securing a promissory note, not due, for fifteen hundred dollars, was assigned absolutely as security for a loan of three hundred dollars, and this sum was recited as the consideration for the assignment, and subsequently the assignee pledged the mortgage for a loan of twelve hundred dollars, it was held that the first pledgor could not redeem the mortgage from the last assignee, except upon payment of the sum which the latter had advanced upon it.[1] The recital in the first assignment, of the consideration, was not sufficient to put the last assignee on inquiry, or to prove fraud on his part.

§ 142. **A delivery of a note or bond and mortgage as collateral security, without any written assignment,** is a valid equitable pledge of those securities, which courts of law will take notice of and protect.[2] A negotiable note may be pledged by delivery without indorsement, in which case the legal title will remain in the payee, but he will hold this title for the benefit of the pledgee, so long as the latter retains possession of the note as security. The payee may, while the note is so held, indorse it, and thereby transfer the legal title to another, who will then hold such title as it was before held by the payee, that is, subject to the equitable claim of the pledgee.[3]

[1] Briggs v. Rice, 130 Mass. 50, 51. "As a prudent man taking a note not yet due, it was sufficient for the assignee to know that the assignment transferred to him a good title to the mortgage security. It is not enough that an over prudent and cautious person, if his attention had been called to the circumstance in question, would have been likely to seek an explanation of it." Per Colt, J.

[2] Crain v. Paine, 4 Cush. (Mass.) 483, 1 Am. Dec. 807; Dickey v. Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. Rep. 33; Crane v. Gough, 4 Md. 316; Kamena v. Huelbig, 23 N. J. Eq. 78; Galway v. Fullerton, 17 N. J. Eq. 389; Prescott v. Hull, 17 Johns. (N.Y.) 284; Runyan v. Mersereau, 11 Johns. (N. Y.) 534; Bank of Woodland v. Duncan, 117 Cal. 412, 49 Pac. Rep. 414; McArthur v. Magee, 114 Cal. 126, 130, 45 Pac. Rep. 1068; Adler v. Sargent, 109 Cal. 42, 41 Pac. Rep. 799.

[3] Proctor v. Baldwin, 82 Ind. 370; Kavanaugh v. Brodball, 40 Neb. 875, 59 N. W. Rep. 517.

Non-negotiable paper may, like that which is negotiable, be effectually pledged by indorsement and delivery by the payee or owner[1] of such paper, or by delivery without indorsement.

A pledgee of bonds of a corporation which are secured by a mortgage is entitled to a proportionate part of the security; and though the pledge was made by the corporation itself, the pledgee is entitled, upon a foreclosure of the mortgage, to prove the whole amount of his bonds, and to share in the distribution up to the amount of his debt, and is not limited to proof of an amount simply equal to the amount of his debt.[2]

A promissory note or a corporate bond made negotiable in form, and delivered before maturity, confers upon the holder a title which is not subject to equities existing between the original parties; and if such note or negotiable corporate bond be secured by a mortgage, the mortgage being but an incident of the debt, the negotiable character of the latter is imparted to the former, to the extent that the assignee of a mortgage securing such negotiable debt, taking it in good faith before maturity, takes it free from any equities existing between the original parties.[3]

But if the debt be not negotiable, the pledgee of the mortgage will take it subject to the equities between the original parties. An ordinary mortgage bond being non-negotiable, a pledgee of a mortgage and mortgage bond will hold his pledge subject to existing equities between the original parties. Thus, a mortgage and bond executed to secure a vendor under a con-

[1] Norton v. Piscataqua Ins. Co., 111 Mass. 532; Jones v. Witter, 13 Mass. 304.

[2] Duncomb v. New York, Housatonic and Northern R., 84 N. Y. 190; Lehman v. Tallassee Manuf. Co., 64 Ala. 567; Morton v. New Orleans & Selma R. Co., 79 Ala. 590, 622; Dickey v. Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. Rep. 33.

[3] Jones on Mortgages, § 834.

In a recent decision in Minnesota it was said that "it is the settled law of this state that a mortgage has none of the privileges of negotiable paper, but is a mere chose in action; hence an assignee thereof takes it subject to any defense that exists between the original parties, unless they are equitably estopped by their acts, or otherwise, from asserting it as against the assignee." Moffett v. Parker, 71 Minn. 139, 142, 73 N. W. Rep. 850, per Start, C. J. The grounds of this decision are not apparent.

tract for a purchase of land, and not in payment of an installment of the purchase money, not being negotiable securities, are subject in the hands of an assignee to the equities existing between the original parties; and upon a rescission by them of the contract of sale, the principal indebtedness is extinguished, and the validity of the bond and mortgage destroyed.[1]

§ 143. **A mortgage note or bond without the mortgage may be the subject of a pledge,** and will give the pledgee the benefit of the mortgage security.[2] It would seem that ordinarily a simple transfer in absolute form of a mortgage note to a creditor, as security for a debt, is to be regarded as a pledge rather than a mortgage. Such a transfer carries the legal title to the note and the equitable title to the mortgage property. It carries with it the mortgage lien, as an accessory to the debt; and it carries with it any other lien which secures such principal obligation.[3]

The first pledgee of a mortgage note or bond may repledge it with like effect; or he may by agreement with the mortgagor transfer the mortgage note to another who advances or pays to the first pledgee the amount due him upon the security, whereupon the latter transferee is subrogated to the rights of the former, and will hold the note and mortgage as security for the money advanced.[4]

Where one borrowed money from bank, purchased land therewith, sold the same, giving a bond for title and taking the note of his vendee payable to his order, and subsequently deposited with the bank, as collateral security for his debt, this note without indorsement and the deed which he had taken to himself, the bank stood in the position of a purchaser of the

[1] Wanzer v. Cary, 76 N. Y. 526.

[2] Morris Canal & Banking Co. v. Fisher, 9 N. J. Eq. 667; Lœwenthal v. McCormick, 101 Ill. 143; Logan v. Smith, 62 Mo. 455; Whittemore v. Gibbs, 24 N. H. 484, 487; Quimby v. Williams, 67 N. H. 489, 493, 41 Atl. Rep. 862.

[3] Kamena v. Huelbig, 23 N. J. Eq. 78; Mechanics' Building Association v. Ferguson, 29 La. Ann. 548; Swope v. Leffingwell, 72 Mo. 348.

[4] Lœwenthal v. McCormick, 101 Ill. 143.

note, and its equity to hold the land subject for the loan was superior to the lien of any judgment rendered against its debtor after the deposit of the note and deed as collateral.[1]

§ 144. **A debtor may give his own note and mortgage as collateral security** for another note made by him, or for any distinct debt. But there must be a debt to be secured distinct from that created by the note and mortgage, otherwise these create the principal debt. Thus if a note and deed of trust be given, on the purchase of land, for a portion of the purchase money, they are not collateral security, but the principal debt; and they are not converted into collateral security by the vendor's giving the purchaser a written agreement to accept a less sum if paid within a short period, instead of the period expressed in the note, and to assign the note and mortgage to enable the purchaser to borrow the money. The note and mortgage in such case are merely evidence of the original indebtedness.[2]

III. *Pledges of Insurance Policies.*

§ 145. **A life insurance policy may be effectually pledged** by delivery either with or without a written assignment,[3] although

[1] Smith v. Jennings, 74 Ga. 551.

[2] Harding v. Commercial Loan Co., 84 Ill. 251. See Morris Canal & Banking Co. v. Fisher, 9 N. J. Eq. 667, 685, 701; Seymour v. Lewis, 19 Wend. (N. Y.) 512. But see Atlantic F. & M. Ins. Co. v. Boies, 6 Duer (N. Y.) 583.

[3] Collins v. Dawley, 4 Colo. 138, 34 Am. Rep. 72; Norwood v. Guerdon, 60 Ill. 253; Tateum v. Ross, 150 Mass. 440, 23 N. E. Rep. 230; Gilman v. Curtis, 66 Cal. 116, 4 Pac. Rep. 1094; Hewins v. Baker, 161 Mass. 320, 37 N. E. Rep. 441; Norton v. Piscataqua Ins. Co., 111 Mass. 532; Currier v. Howard, 14 Gray (Mass.) 511; Palmer v. Merrill, 6 Cush. (Mass.) 282, 52 Am. Dec. 782; Crain v. Paine, 4 Cush. (Mass.) 483, 50 Am. Dec. 807; Ellis v. Kreutzinger, 27 Mo. 311; Grant v. Kline, 115 Pa. St. 618, 9 Atl. Rep. 150.

In England policies of life assurance are frequently the subjects of mortgages. The mortgage is formally drawn with full and elaborate recitals, covenants, and powers. It assigns the policy, with a proviso for redemption upon the payment of the debt secured. It contains covenants that the mortgagor will keep up the assurance and will pay the premiums, and provides that if the mortgagor fails to do so, the mortgagee may advance the moneys for this purpose, and the policy shall stand charged for the payment

the policy contains a condition that it shall be void if assigned without the written consent of the insurers.[1] The condition does not prevent the transfer or pledge of the policy. It reserves to the insurers the right to give or refuse their consent to such transfer; and the insurers may at their election avoid the policy if it be transferred without their consent. The effect of the condition is to defeat the policy; not to defeat the transfer. "The same reasoning applies to provisions requiring that assignments should be in writing, or requiring duplicate or certified copies to be delivered to the company at any particular place."[2] Under such provisions it seems that the issuing of a paid-up policy by the insurance company in place of the original policy after an assignment of the latter without its consent is a waiver of the requirements.[3]

Such a pledge having been made to a person residing in the state in which the insurers were chartered as a corporation, he may in his own name by a bill in equity, or in the name of the administrator of the insured, enforce his claim, if the company see fit to waive the condition, and the administrator could not defeat the prosecution of the suit. If an administrator be appointed in Illinois, where the deceased had his domicil, and he brings suit there against the insurers, and obtains an injunction against the company's paying the policy to a creditor holding the policy in pledge, the pledgee having been appointed ancillary administrator in Massachusetts, where the insurance company was incorporated, may maintain a suit

of such advances. A power is given to the mortgagee in case of default to sell the policy at public auction or private sale, or to surrender it to the office which issued it. Frequently a surety joins in all the covenants of the mortgage.

Such a mortgage of a policy affords a much better security than a pledge, especially if this be made without writing. For a form of such a mortgage, see Davidson's Precedents in Conveyancing, 4th ed. 1881, vol. 2, pt. 2, p. 490; and for observations upon such mortgages, see same, pp. 122-136.

[1] Merrill v. N. E. Mut. Life Ins. Co., 103 Mass. 245, 4 Am. Rep. 548; Hewins v. Baker, 161 Mass. 320, 37 N. E. Rep. 441.

[2] Hewins v. Baker, 161 Mass. 320, 37 N. E. Rep. 441, per Morton, J.

[3] Hewins v. Baker, 161 Mass. 320, 37 N. E. Rep. 441.

there upon the policy, the pendency of the suit by the general administrator being no bar; for the pledgee, having the equitable interest and immediate possession of the policy, is entitled to its control and collection in preference to the principal administrator of the estate.[1]

It is not necessary that the pledgee or assignee should have an interest in the life insured, either as between him and the insurance company, or as between him and his assignors.[2]

If the assignment of a life policy be made by an instrument which is in form and substance a mortgage, the transaction will be a mortgage and not a pledge of the policy.[3]

A creditor who takes a policy of insurance upon his debtor's life as collateral security, and charges the premium for a term of years as a part of the principal of the loan, is bound to keep the policies alive; and if he fails to do so, he is either regarded as making himself the insurer, or he is made liable for negligence in not keeping the insurance in force.[4]

The pledgor of a life insurance policy, in the absence of an agreement to the contrary, impliedly undertakes to keep the certificate alive so long as it remains as security, and if he fails to pay the assessments as they become due the pledgee may do so and recover the amounts so paid from the pledgor

[1] Merrill v. N. E. Mut. Life Ins. Co., 103 Mass. 245, 4 Am. Rep. 548.

[2] Dixon v. National L. Ins. Co., 168 Mass. 48, 46 N. E. Rep. 430.

[3] Dungan v. Mut. Benefit L. Ins. Co., 38 Md. 242, 253. In this case, Miller, J., delivering the opinion of the court, thought there was reason to regard the transfer as a mortgage rather than a pledge, not only by reason of the form of the transfer, but also from consideration of the subject matter of the transfer. "Continuing life policies, if they have any, have not the same easily ascertained market value as personal chattels or shares of stock in banks or other corporations. They are not ordinary articles of sale in market overt or at the stock boards. The power of sale incident to a pledge could not be readily exercised, if at all, in case of default, and hence no one would be inclined to accept them as securities for loans and advances with no more interest or title in, or control over them, than that which the law of bailments confers."

In *England* life insurance policies are mortgaged as security more frequently than pledged. Salt v. Northampton [1892], A. C. 1; Deering v. Bank, 12 App. Cas. 20.

[4] Soule v. Union Bank, 45 Barb. (N. Y.) 111, 30 How. Pr. 105.

in assumpsit, even though the payments were made by the pledgee after a repudiation of responsibility by the pledgor.[1]

A pledgee of a life insurance policy has no right without the consent of the pledgor to surrender the policy to the insurance company and receive its cash value.[2] The rule of damages in such a case would, it seems, be the cost of replacing the policy on the same terms in a perfectly sound company at the time of the surrender; but where it appears that at that time the insured was suffering from a fatal disease, from which he subsequently died, and that he had ceased to be an insurable risk, and the company, having cancelled the obligation, refused to reinstate it, the damages are the face value of the policy, less what it would cost to carry it by payment of another premium, which fell due before the death of the insured, with interest from the date of the conversion.[3]

§ 146. **A policy of life insurance payable to a married woman may be pledged by a delivery of it with an indorsement of it by her in blank** which her husband has filled up by an assignment.[4] By indorsing the policy and delivering it to her husband, she clothes him with all necessary evidence of a power to pledge the instrument, and she can not afterwards claim that her husband had no authority to assign it. "Such assignments are of daily occurrence in the way of collateral security; and where a policy is made payable to the wife, and she indorses it in blank, and the husband pledges it, we are wholly at a loss to conceive on what ground it can be claimed that such an assignment is not valid in a court of equity. The husband and the wife are the only parties interested, and they have both participated in the assignment. The law provides no particular mode by which the wife is to manifest her consent, as in the case of a conveyance of lands; and if such an

[1] Emmeluth v. Cook, 10 Hawaii 125.

[2] Manton v. Robinson, 19 R. I. 405, 34 Atl. Rep. 148.

[3] Toplitz v. Bauer, 161 N. Y. 325, 55 N. E. Rep. 1059.

[4] Wirgman v. Miller, 98 Ky. 620, 33 S. W. Rep. 937; First Nat. Bank v. Goodman, 55 Neb. 409, 419, 58 Neb. 701.

assignment as was made in the present case is not valid, then a policy payable to a married woman is not assignable at all. * * * She gave to the public the evidence of her consent by indorsing the policy in blank,—an act which could be interpreted as done for no other purpose than an assignment; and the same consequences must be attached to this act against her as would follow from such an act performed by any other person. When innocent parties have advanced money to her husband on the faith of such blank assignment, she can not be permitted to repudiate the transaction. She can not be permitted to enable her husband to perpetrate a fraud.'"[1]

Where a life insurance policy is pledged to secure a debt also secured by a mortgage on a homestead, an agreement by the assured that premiums advanced by the pledgee shall be a first lien in the policy is valid without the wife's consent, and does not increase the burden on the homestead.[2]

§ 146a. **Where a policy of insurance on the husband's life, payable to his wife, was assigned by both to a creditor of the husband** "as collateral security for the amount of his demands subsisting against the husband at his decease as creditor or as surety," and the husband subsequently received a discharge in bankruptcy, his creditor proving a part of his claim and assenting to the debtor's discharge, it was held that upon the death of the husband without having satisfied the balance of his debt the creditor was entitled to enforce his security under the assignment of the policy, he having a subsisting demand within the meaning of the assignment. The word "creditor" in such case does not necessarily mean a person having a claim capable of legal enforcement. To give it that meaning would be to hold that the parties contemplated that the security should continue if the debtor remained solvent, but not if he became bankrupt and got a discharge.[3]

[1] Norwood v. Guerdon, 60 Ill. 253, 257, per Lawrence, C. J.

[2] Blake v. McCosh, 91 Iowa 544, 60 N. W. Rep. 127.

[3] Champion v. Buckingham, 165 Mass. 76, 42 N. E. Rep. 498.

§ 146b. **A certificate of membership in a beneficiary association can not be pledged,** in case the rules of association provide that upon the death of a member the amount due on his certificate shall be payable to his widow, children and other relatives in a designated order. A member can not direct the payment of the amount due upon his certificate to any person other than the beneficiaries so named and in the order named.[1]

Such a certificate in a beneficiary association organized for the purpose of assisting widows and other dependents of deceased members, is protected by a statute declaring that the beneficiary fund shall not be liable to attachment or to the claims of creditors. "It is not contemplated by the statute that the right to the assistance secured by membership shall be assignable to creditors during the member's life. The statute intends a particular and special method of assistance to the designated classes of persons after the member's death; and the purpose of the statute would be defeated by allowing an assignment during the member's life, to his creditors, as collateral security."[2]

§ 147. **A policy of fire insurance may be effectually pledged by delivery** without a formal assignment. Thus when the directors of a manufacturing corporation placed the company's fire insurance policies in the hands of two directors without any formal assignment, to secure loans made and to be made by such directors and others to the corporation, it was held there was a sufficient delivery of the policies to sustain the pledge.[3] Judge Treat, in delivering the judgment in this case, said: "It is a matter of daily occurrence that creditors require their debtors to insure their property and assign or pledge the same as security. They are not willing to trust the event of the debtor's solvency if his property is destroyed by fire, and hence exact such security in addition to his personal lia-

[1] Odd Fellows' Beneficial Asso. v. Diebert, 2 Ohio C. C. 462.

[2] Briggs v. Earl, 139 Mass. 473, 476, 1 N. E. Rep. 847.

[3] Stout v. Yaeger Milling Co., 13 Fed. Rep. 802.

bility. In the absence of such an arrangement the creditor may well be supposed to rely upon his debtor's ability to meet his liabilities, irrespective of the contingency by fire. The debtor was not bound to insure, and if he did not, the creditor had no recourse except upon his remaining assets. If he did insure, and the proceeds thereof became a part of his general estate, they became subject to the demands of his creditors, equally with other assets. But if the insurance was made, not for the general benefit, but solely or primarily for the security of a specified class of creditors, by agreement with them, why should not the transaction be upheld, and by what legal or equitable right could the unsecured creditors claim that they should share in such securities? The question, however, in this case is as to the pledge of the policies and their renewals for the purposes alleged. There was no formal assignment, and no consent of the insurance companies to such assignments. * * * When the fire occurred and the amount of losses was collected, the sums so collected would necessarily have to be paid over to the pledgees, to the amount of their demands secured. The fact that the creditors were directors, and the company, pledgor, and directors were the trustees for the benefit of said creditors, can not affect the good faith of the transaction, if the agreement to pledge existed at the time of the advances, and the creditors were within the terms of the pledge. Other or general creditors who had not taken such securities have no ground of complaint. There was no preference within the admitted rule, but merely an enforcement of securities."

The deposit of a policy of insurance with a creditor of the assured, as collateral security, gives the creditor a lien on the proceeds of the policy, which is binding upon the underwriters and upon the assured, and upon all persons who take an interest from the assured with notice of such lien.[1] Even

[1] Godin v. London Ins. Co., 1 Burr. 489, 494; Wells v. Archer, 10 S. & R. (Pa.) 412, 13 Am. Dec. 682; Dickey v. Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. Rep. 33; Soule v. Union Bank, 45 Barb. 111; Chapman v. McIlwrath, 77 Mo. 38.

a clause in the policy which prohibits a transfer of it without the consent in writing of the insurers does not apply to a deposit of the policy by way of pledge.[1] The interest of the insurers can not be affected by any transfer which does not also transfer the title to, and a control over, the property assured; and therefore such restrictions have not been understood to apply to assignments in which the underwriters can have no interest, and to control which they can have no motive.[2]

§147a. **A pledge of a fire insurance policy may be made by an assignment of it without a transfer of the property insured,** unless a by-law of the insurance company or the policy itself provides that the policy shall not be assignable for purposes of collateral security. The consent of the company to such assignment given in the form used for an assent to an absolute transfer and without inquiry whether the property had been transferred to the assignee is valid and binding. Proof of loss may be made by the insured for the benefit of the pledgee.[3]

A policy of insurance against loss by fire provided that "this policy is not assignable for purposes of collateral security, but for such purpose it is to be made payable in case of loss by indorsement on its face. In cases of actual sale and transfer of title, leave having been previously obtained, the form subjoined may be used, which must be executed at the time of said transfer." Then followed an assent to an assignment signed by an agent of the company. This was in turn followed by an assignment by the insured of "all his title and interest in this policy, and all advantages to be derived therefrom." The assignment in fact was made as collateral security for a debt, which was also secured by a mortgage of the insured property executed a few days after the policy was as-

[1] Dickey v. Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. Rep. 33; Ellis v. Kreutzinger, 27 Mo. 311; Griffey v. New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. Rep. 309; True v. Manhattan F. Ins. Co., 26 Fed. Rep. 83.

[2] Ellis v. Kreutzinger, 27 Mo. 311, 62 Am. Dec. 270.

[3] Merrill v. Colonial Mut. F. Ins. Co., 169 Mass. 10, 47 N. E. Rep. 439; East Texas F. Ins. Co. v. Coffee, 61 Tex. 287.

signed. The agent who signed the assent had no authority to assent to an assignment by way of collateral security, and neither knew that this was such an assignment, nor gave the assignee any reason to suppose that he knew it. It was held that the assignee could not maintain an action upon the policy.[1]

§ 147b. **If a pledgee at his own expense and without any agreement or understanding with the pledgor insures the property pledged** and after a loss collects the money from the insurer, he is not bound to account for it to the pledgor. This rule was affirmed in Massachusetts in a case where one as "trustee" took a bill of sale of an interest in a schooner as security for a debt, agreeing in writing as "trustee" to reconvey the same when the debt should be paid. After the debtor's death the creditor took charge of the vessel, and without any agreement with the debtor or his representative, insured such interest as "trustee," and after a loss collected insurance money in excess of the debt, and he was held not to be accountable to the debtor's representative for any part of the insurance money.[2]

IV. *Pledges of Savings Bank Books.*

§ 148. **The delivery of a savings bank book as collateral security for a debt,** although unaccompanied by a written assignment, transfers an equitable title to the deposit represented by the book, which will prevail against a creditor subsequently attaching the deposit.[3] "A savings bank book has a peculiar character. It is not a mere pass-book, or the statement of an account; it is issued to the person in whose name the deposit is made, and with whom the bank has made its contract; it is his voucher, and the only security he has, as evidence of his debt. The bank is not obliged to pay the depositor the money in its hands except upon presentation of the book; and if in

[1] Lynde v. Newark F. Ins. Co., 139 Mass. 57, 29 N. E. Rep. 222.

[2] Burlingame v. Goodspeed, 153 Mass. 24, 26 N. E. Rep. 232, Allen, J., and Field, C. J., dissenting.

[3] Taft v. Bowker, 132 Mass. 277; Boynton v. Payrow, 67 Me. 587.

good faith and without notice it pays the money deposited to the person who presents the book, although the book has been obtained fraudulently by him, the bank is not liable to the real depositor.

"The book is the instrument by which alone the money can be obtained, and its possession is thus some evidence of title in the person presenting it at the bank. It is in the nature of a security for the payment of money; it discloses the existence and amount of the fund to the person receiving it, and affords him the means of obtaining possession of the same."[1]

The delivery of a savings bank book by a debtor to a third person for delivery to his creditor as security for a debt, creates a valid pledge of the book and of the deposit represented by it.[2]

An heir can not make an effectual pledge of a savings bank book or of the deposit, as against the administrator of the depositor's estate.[3]

V. *Pledges of Judgments.*

§ 149. **An assignment of a sum due on a judgment**, stipulating that when collected it shall be applied on a bond and mortgage held by the assignee against the assignor with a covenant by the latter not to collect it, is on its face an assignment as collateral security, and parol evidence to show this is not required.[4]

A claim in suit may be pledged by the owner of it, but the evidence of the debt should be delivered to the pledgee, who should prosecute the action, though he may be obliged to do this in the pledgor's name.[5]

[1] Per Endicott, J., in Pierce v. Boston Sav. Bank, 129 Mass. 425, 432, 37 Am. Rep. 371; where it was held that a delivery of a savings bank book makes a valid gift *mortis causa*. It also constitutes a good gift *inter vivos*. Hill v. Stevenson, 63 Me. 364, 18 Am. Rep. 231; Tillinghast v. Wheaton, 8 R. I. 536, 5 Am. Rep. 621; Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39; Penfield v. Thayer, 2 E. D. Smith, 305.

[2] Boynton v. Payrow, 67 Me. 587.

[3] Boynton v. Payrow, 67 Me. 587.

[4] Mulford v. Muller, 3 Abb. (N. Y.) Dec. 330; 1 Keyes 29.

[5] Hiligsberg's Succession, 1 La. Ann. 340.

VI. *Pledges of Land Certificates.*

§ 150. **Land certificates issued by a state,** such as certificates of school lands in the state of Wisconsin, though by statute made transferable by written assignment, are not a proper subject of pledge.[1] If such certificates be deposited by a debtor with his creditor as security for a note, which provides that the creditor may sell them on the non-payment of the note, the debtor's interest in the land and certificates can not be extinguished or converted by a sale as in the case of a pledge of goods. A deposit of them under such an agreement is not a pledge of personal property, but an equitable mortgage of the debtor's interest in the lands; and the only mode in which the creditor can enforce the security is by a suit in equity for the purpose.[2] Therefore, in case such certificates be deposited as collateral security with a power to sell them upon default, a sale under the power is ineffectual.

Moreover, as such certificates are not negotiable instruments, and the indorsement thereof is not conclusive evidence of the holder's ownership, an agent can not effectually pledge them unless he has express authority to make such pledge; therefore, if such certificates have been placed in his hands to sell, and he pledges them to secure his own debts, his pledgee acquires no title to them as against the real owner. A general agent has no authority to pledge his principal's property, unless this be in the form of negotiable securities standing absolutely in his own name, as security for his own debts; and though the agent be clothed with the insignia of title, any one taking such certificates in pledge is bound to inquire as to the agent's authority.[3]

[1] Whitney v. State Bank, 7 Wis. 620; Smith v. Mariner, 5 Wis. 551, 68 Am. Dec. 73. See Jones on Mortgages, § 176. An assignment as security of a land contract issued by a railroad company for the conveyance of specific land, was regarded as a mortgage in Scharman v. Scharman, 38 Neb. 39, 56 N. W. Rep. 704. See Dimick v. Grand Island Banking Co., 37 Neb. 394, 55 N. W. Rep. 1066; Folsom v. McCague, 29 Neb. 124, 45 N. W. Rep. 269.

[2] Mowry v. Wood, 12 Wis. 413; in effect overruling Ainsworth v. Bowen, 9 Wis. 348.

[3] Whitney v. State Bank, 7 Wis. 629.

CHAPTER V.

PLEDGES OF CORPORATE STOCKS.

I. *Corporate Stocks a Proper Subject of Pledge.*

§ 151. **Whether stock of a corporation can be the subject of a pledge** was formerly doubted, for the reason that, in order to constitute a pledge, possession must be given of the thing pledged, and possession of shares in a corporation can not be transferred except by a written transfer, which apparently passes the legal title and general property in the stock, which are the characteristics of a mortgage, and not merely a special property, which is the characteristic of a pledge. A delivery of a certificate merely does not transfer the stock, but a written transfer is necessary.[1] Yet a transfer of stock as collateral security is now generally regarded as a pledge rather than a mortgage, because this view is considered to be more in accordance with the intention of the parties,[2] and it is no objection

[1] Wagner v. Marple, 10 Tex. Civ. App. 505, 31 S. W. Rep. 691. See Lawler v. Kell, 6 Ohio Dec. 311.

[2] Newton v. Fay, 10 Allen (Mass.), 505, 507, per Chapman, J.; Wilson v. Little, 2 N. Y. 443, 1 Sandf. 351, 51

that the transfer passes the legal title and general property in the stock.

§ 152. **A written transfer of some kind which shall pass the legal title is essential in a pledge of stock,** though this transfer may be informal, such as a blank indorsement of the certificate, or a power of attorney signed in blank. There must be a transfer on the books of the company, or a power of attorney authorizing a transfer, or some assignment or contract in writing by which the holder may assert title, and compel a transfer when desired.[1]

A delivery of a certificate of stock without a transfer or a writing which will enable the holder to make a transfer of the stock to his own name, is not a complete delivery; it does not place the stock in the full control of the pledgee. But a mere delivery of a certificate of stock without any transfer of it is not regarded as a sufficient transfer of it to constitute a pledge;[2] though such a delivery has in a few cases been held to be sufficient to vest an equitable title.[3]

Am. Dec. 307; Allen v. Dykers, 3 Hill (N. Y.) 593, 7 Hill (N. Y.) 497; Vaupell v. Woodward, 2 Sandf. (N. Y.) Ch. 143; Hasbrouck v. Vandervoort, 4 Sandf. 74; Lewis v. Graham, 4 Abb. Pr. 106; Gilmer v. Morris, 80 Ala. 78, 60 Am. Rep. 85; Spreckels v. Macfarlane, 9 Hawaii 166; White v. Platt, 5 Denio (N. Y.) 269; Gilpin v. Howell, 5 Pa. St. 41, 45 Am. Dec. 720; Morris Canal & Banking Co. v. Fisher, 9 N. J. Eq. 667; Morris Canal & Banking Co. v. Lewis, 12 N. J. Eq. 323, 64 Am. Dec. 423; Mechanics' Building & Loan Ass. v. Conover, 14 N. J. Eq. 219; Murdock v. Columbus Ins. Co., 59 Miss. 152, per Campbell, J.; Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 208; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Thompson v. Holladay, 15 Ore. 34, 14 Pac. Rep. 725; Barse Live Stock Co. v. Range Val. Cattle Co., 16 Utah 59, 50 Pac. Rep. 630.

[1] Cumming v. Prescott, 2 Young & C. (Exch.) 488; Nisbit v. Macon Bank & Trust Co., 12 Fed. Rep. 686, per Pardee, J. Succession of Lanaux, 46 La. Ann. 1036, 15 So. Rep. 708; Lallande v. Ingram, 19 La. Ann. 364; Wagner v. Marple, 10 Tex. Civ. App. 505, 31 S. W. Rep. 691.

[2] Wagner v. Marple, 10 Tex. Civ. App. 505, 31 S. W. Rep. 691.

[3] Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497; City F. Ins. Co. v. Olmsted, 33 Conn. 476, 480; Platt v. Hawkins, 43 Conn. 139; Platt v. Birmingham Axle Co., 41 Conn. 255.

The civil code of Louisiana apparently authorizes a pledge of stock by the mere delivery of the certificate.

Where two members of a banking firm were also president and cashier of a bank and trust company, and the firm being indebted to the company, they agreed with the directors of the company to deposit certificates of stock to secure such indebtedness, and accordingly certificates standing in the firm's name, not indorsed or accompanied by any power to transfer, were deposited with the cashier, and it appeared that the firm retained and exercised the right to withdraw such certificates and substitute others, without consulting the directors of the bank, it was held that there was no such delivery of the stock as would constitute a pledge of it, because the firm had full control of it and could transfer it without consulting the bank, and the bank, not holding any transfer of the stock, could not control it without the consent of the firm, and the execution by them of a power of transfer.[1]

§ 152a. **A pledge of corporate stock made by a written assignment on a separate paper,** the certificate remaining in the possession of the pledgor, is ineffectual as against the pledgor's receiver who takes possession of the certificates.[2] If, however, no certificate has been issued such assignment by a separate instrument is sufficient to create a pledge.[3]

A declaration in writing by a debtor placed in a tin box in a safe deposit vault that certain securities owned by him are held as collateral security for the benefit of a certain creditor to secure a debt described does not create a pledge of the securities for the payment of such debt.[4]

It provides that "when a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations or claims upon other persons, he shall deliver to the creditor the notes, bills of exchange, certification of stock, or other evidences of the claims or rights so pawned, and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgers thereof if made in good faith." Civ. Code, art. 3158.

[1] Nisbit v. Macon Bank & Trust Co., 12 Fed. Rep. 686. See, also, Cross v. Zellerbach, 10 Pac. Coast L. J. 123; Sigourney v. Zellerbach, 55 Cal. 431.

[2] Atkinson v. Foster, 134 Ill. 472, 25 N. E. Rep. 528.

[3] First Nat. Bank v. Gifford, 47 Iowa 575; Harris's Appeal (Pa.), 12 Atl. Rep. 743; Thorp v. Woodhull, 1 Sandf. Ch. (N. Y.) 411. And see Brigham v. Mead, 10 Allen 245.

[4] Girard Trust Co. v. Mellor, 156 Pa. St. 579, 27 Atl. Rep. 662. See Hook v. Ayers, 80 Fed. Rep. 978.

§ 153. **A transfer of the legal title is not inconsistent with the existence of a pledge.**[1] On the contrary, it is true that incorporeal property, being incapable of manual delivery, can not generally be pledged without a written transfer of the title. Collateral securities, such as negotiable instruments, stocks in incorporated companies, and choses in action generally, are pledged in this mode. "Such transfer of the title performs the same office that the delivery of possession does in case of a pledge of corporeal property. The transfer of the title, like the delivery of possession, constitutes the evidence of the pledgee's right of property in the thing pledged."[2] In such case, although the pledgee receives the apparent legal title, the general property in the security remains in the pledgor.[3] Whenever it appears by the terms of the contract that the debtor has a legal right to the restoration of the security, on payment of the debt, he may be said to have the general property in it. This general property is nothing more than a legal right to the restoration of the thing pledged on payment of the debt.[4] Thus, an absolute transfer of stock in a corporation as collateral security for the payment of a note, which states that the stock was so deposited, is a pledge and not a mortgage; for, by a fair construction of the transfer and note, taken together, the general property in the stock remains in the pledgor.[5] Such was also held to be the effect of a transfer by a corporation of its own stock as security for a debt, upon an agreement that the stock should be transferred back upon payment of the debt.[6] In general, it may be said that any trans-

[1] Wilson v. Little, 2 N. Y. 433, 51 Am. Dec. 307; overruling Huntington v. Mather, 2 Barb. 538.

[2] Rice v. Gilbert, 173 Ill. 348, 50 N. E. Rep. 1087; Brewster v. Hartley, 37 Cal. 15, 25, 99 Am. Dec. 237, per Rhodes, J.

[3] Garlick v. James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294; Evans v. Darlington, 5 Blackf. (Ind.) 320.

[4] Wilson v. Little, 2 N. Y. 443, 448, 51 Am. Dec. 307, per Ruggles, J.

[5] Wilson v. Little, 2 N. Y. 443, 448, 51 Am. Dec. 307, per Ruggles, J.; Hasbrouck v. Vandervoort, 4 Sandf. (N.Y.) 74, 78; Lewis v. Graham, 4 Abb. (N.Y.) Pr. 106; Mechanics' Building & Loan Ass. v. Conover, 14 N. J. Eq. 219; Merchants' Bank v. Cook, 4 Pick. (Mass.) 405; Doak v. Bank of the State, 6 Ired. L. (N. C.) 309.

[6] Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

fer as collateral security of shares in a corporation, made in the ordinary form of an indorsement of a certificate, or by delivery of it with a power of attorney to make a transfer upon the books of the corporation, or by an actual transfer upon the books, is a pledge and not a mortgage; and it is immaterial in this respect whether such transfer appear to be absolute, or is expressed to be made as security; though a transfer made in the usual form of a mortgage, with a defeasance, would doubtless be regarded as a mortgage.[1]

A chattel mortgage of corporate shares is valid between the parties though there is no transfer of the certificates, and as against the mortgagor the mortgagee upon a foreclosure of the mortgage may compel a transfer of the certificates to himself.[2]

§ 153a. **A chattel mortgage of corporate stock is not effectual as against a transferee of the certificate without notice,** nor as against the mortgagor's creditor attaching the stock in the usual manner, nor as against the corporation without actual notice of the mortgage. That such a mortgage, though duly recorded, is of no avail as against a *bona fide* purchaser or pledgee of the certificate of stock is well shown by a decision of the supreme court of Kentucky in which Prior, J., for the court, said: "Much of the business of the country is conducted on the faith of the pledge of such stock as collaterals; and to adjudge that the holder of the stock by transfer on the books of the corporation, or by indorsement and delivery by the owner, is subordinate in his claim to the mortgagee, upon the doctrine of constructive notice, would paralyze trade and

[1] Hasbrouck v. Vandervoort, 4 Sandf. (N. Y.) 74; Nabring v. Bank of Mobile, 58 Ala. 204; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Dungan v. Mutual Benefit L. Ins. Co., 38 Md. 242; Ede v. Johnson, 15 Cal. 53; Smith v. Quartz Mining Co., 14 Cal. 242; Gilmer v. Morris, 80 Ala. 78, 85, 60 Am. Rep. 85; Williamson v. New Jersey R. Co., 26 N. J. Eq. 398; Manns v. Brookville Nat. Bank, 73 Ind. 243; Campbell v. Woodstock Iron Co., 83 Ala. 351, 3 So. Rep. 369; Gilmer v. Morris, 80 Ala. 78, 89, 60 Am. Rep. 85.

A few early cases to the contrary are not to be regarded, as: Huntington v. Mather, 2 Barb. (N. Y.) 538; Adderly v. Storm, 6 Hill (N. Y.) 624.

[2] Campbell v. Woodstock Iron Co., 83 Ala. 351, 3 So. Rep. 369; Tregear v. Etiwanda Water Co., 76 Cal. 537, 18 Pac. Rep. 658.

open a wide field for the fraudulent disposition of such valuable interests at the expense of honest and confiding purchasers.'"[1]

The recording of a chattel mortgage of shares of stock is not notice to a creditor of the owner such as to prevent his attachment of the shares in the form provided by statute from taking effect and having precedence of the mortgage.[2]

A chattel mortgage of corporate stock is effectual if the certificate is indorsed and delivered to the mortgagee or to a trustee for his use.[3]

§ 153b. **A pledge by a husband of corporate stock, which he purchased with his wife's money,** but in his own name contrary to her directions, is valid as against the wife, where the certificate recites that he is the owner and the pledgee accepted the stock as collateral security for a loan to the husband, and, at the time of the loan, had no notice that the stock had been purchased with the wife's money, or that she claimed it as her separate property. For the purpose of security the pledgee held both the legal and the equitable title to the stock. The wife, at most, had only a right in equity to compel her husband to transfer the stock to her; therefore, the bank and she each having an equity, and the bank having, in addition, secured the legal title as collateral for its loan, its claim must prevail over hers.[4]

§ 154. **But if the original contract was not in substance and in fact a security for a loan, but an option to resell,** it can not be held to be a pledge.[5] Thus, if a contract with an insurance

[1] Spalding v. Paine, 81 Ky. 416.

[2] Cates v. Baxter, 97 Tenn. 443, 37 S. W. Rep. 219.

See, however, Manns v. Brookville Nat. Bank, 73 Ind. 243.

[3] Toler v. East Tennessee, Va. & Ga. R. Co., 67 Fed. Rep. 168, 178.

[4] Anderson v. Waco State Bank, 92 Tex. 506, 71 Am. St. Rep. 867, 49 S. W. Rep. 1030, citing Winter v. Montgomery Gas Light Co., 89 Ala. 544, 7 So. Rep. 773; Machinists' Nat. Bank v. Field, 126 Mass. 345; Pratt v. Taunton Copper Mfg. Co., 123 Mass. 110, 25 Am. Rep. 37; Mandlebaum v. North American Min. Co., 4 Mich. 465; Hill v. Moore, 62 Tex. 610; Edwards v. Brown, 68 Tex. 329, 4 S. W. Rep. 380, 5 S. W. Rep. 87.

[5] Simmons v. London Joint Stock Bank (1891), 1 Ch. 270; Crimp v. McCormick Const. Co., 71 Fed. Rep. 356.

company be to subscribe for certain shares of its stock, and to pay therefor in certain installments, the company giving the subscriber the option to resell the stock to it within a given time, the transaction is an actual subscription for stock, and not a loan upon the stock as collateral security. The option is a right secured by contract, and a right in addition to the absolute title to the stock taken by the subscriber. The latter can not, therefore, after taking the stock and paying certain installments, surrender the stock to the company, and reclaim the payments made thereon, thus avoiding responsibility as a stockholder to the detriment of the other stockholders of the company and of its creditors.[1]

And so a customer of a bank having overdrawn his account, and having transferred stock at a fair price "in payment" of the debt, "subject to his right of redemption in two years," it was held that the transaction was neither a pledge nor a mortgage, but a sale of the stock in discharge of the debt. The over-draft was not a loan, and the stock was not transferred as security; and so the transaction did not come within the rule which prevents the conversion of a security for a loan into a sale. After the expiration of the two years the title of the bank to the stock was absolute.[2]

II. *Parol Evidence to Show an Absolute Transfer to be a Pledge.*

§ 155. **An absolute transfer of stock may be shown by parol evidence to be really a pledge** if it is collateral security for a debt,[3] but the evidence in such case should be clear and convincing.[4] An informal transfer not under seal may generally be shown by parol evidence to have been so intended, even in an action at law, just as a bill of parcels, as distinguished from a formal bill of sale under seal, may be shown in an action at law to have been intended only as collateral security.[5] But

[1] Melvin v. Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199.

[2] Lauman's Appeal, 68 Pa. St. 88.

[3] Brick v. Brick, 98 U. S. 514; Ginz v. Stumph, 73 Ind. 209; McMahon v. Macy, 51 N. Y. 155; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. Rep. 10.

[4] Travers v. Leopold, 124 Ill. 431, 16 N. E. Rep. 902.

[5] Newton v. Fay, 10 Allen (Mass.)

however this may be, it is a settled rule in equity that oral proof as to the consideration and purpose of an absolute transfer of stock is admissible.[1] The rule which excludes such evidence to contradict or vary a written instrument has reference to the language of the parties; it does not forbid an inquiry into the object of the parties in executing and receiving the instrument. For this purpose a court of equity will look beyond the terms of the instrument to the real transaction.[2] Consequently, upon proof that an absolute transfer was intended only as collateral security, a bill in equity may be maintained to redeem the stock.[3] But, while this rule of equity protects a debtor from loss in consequence of an apparent sale which was really only a transfer to secure a loan, it will not be applied to defeat an absolute or conditional sale of stock when the transaction is clearly established to be of that character.[4]

A statute requiring the collateral character of a transfer of stock to be expressed in the transfer itself, or in the certificate issued to the holder of such stock, does not exclude other evidence that the transfer was intended merely as collateral security.[5] The purpose of such a provision is to enable the pledgee to hold the security without being liable for the debts of the corporation or to taxation for the property.

Though the by-laws of a corporation or the rules of an association require all transfers to be made absolute in terms, a transfer so made may be shown by parol evidence to have been made as collateral security.[6]

505; Minchin v. Minchin, 157 Mass. 265, 32 N. E. Rep. 164; Boardman v. Holmes, 124 Mass. 438, 442; Riley v. Hampshire County Nat. Bank, 164 Mass. 482, 41 N. E. Rep. 679. See § 16.

[1] Newton v. Fay, 10 Allen (Mass.) 505; Stamford Bank v. Ferris, 17 Conn. 259.

[2] Brick v. Brick, 98 U. S. 514, per Field, J.

[3] Smith v. Quartz Mining Co., 14 Cal. 242. In this case the instrument of transfer contained a provision that the sale should be absolute if the borrower failed to repay the loan when the same should become due; but it was held that the lender did not get an absolute title to the stock by mere default in the payment of the debt. It would be immaterial in this respect whether the instrument be regarded as a mortgage or a pledge.

[4] Lauman's Appeal, 68 Pa. St. 88.

[5] Newton v. Fay, 10 Allen (Mass.) 505.

[6] Ginz v. Stumph, 73 Ind. 209.

§ 156. **A sale of stock accompanied by an agreement on the part of the vendor to repurchase the same within a specified time,** differs very little from a loan of money upon a pledge of the property as collateral security. If stock of a corporation be sold upon such an agreement to repurchase within a year upon the written request of the vendee, his option to regard the stock merely as collateral security for a loan is sufficiently exercised by causing a written notice that he requested the vendor to buy back the shares according to the terms of the agreement, to be left at the vendor's house before the end of the year. In a suit upon such agreement, after the end of the year, it is sufficient to entitle the plaintiff to recover, that, from the time of giving such notice, he had the shares in his control and possession, and was ready to transfer them before taking judgment.[1]

§ 157. **Parol evidence is not admissible to contradict the contract of pledge** such as a statement in a promissory note that certain stock had been transferred as collateral security. It can not be shown that the note was a mere memorandum; and that it was agreed between the parties to it that the stock described as collateral security should operate as payment of the note at its maturity, if it were not previously paid.[2] The rule that oral evidence can not be admitted to alter a written contract is applicable and must prevail.

III. *What Constitutes an Effectual Transfer of Stock at Common Law.*

§ 158. **What constitutes an effectual transfer of stock** is one of the first questions that concerns one who is taking it as security. May he safely hold a certificate issued to his debtor with a transfer indorsed upon it, or accompanied by a power of attorney authorizing a transfer upon the company's books; or is it essential that the shares be actually transferred upon

[1] Boynton v. Woodbury, 101 Mass. 346.

[2] Perry v. Bigelow, 128 Mass. 129.

the books before the security is complete? By general statute, or by provision of charter, or by-law of business corporations, it is generally declared in some form that stock is transferable only on the books of the company. While it is generally conceded that under such a provision a valid transfer of stock may be made as between the parties themselves, by merely delivering a certificate properly indorsed, or accompanied by a power of attorney, authorizing a transfer upon the company's books, there is a wide difference of opinion as to the effect of such a transfer as against the assignor's creditors.

§ 159. **In the absence of legislative regulation transfers of stock are governed by the general principles of the common law.** Shares of stock are the private property of the owner, and he may sell them or transfer them as security in any way he chooses, provided he makes such a delivery of them as the common law requires.[1] The by-laws of the corporation may provide that all transfers shall be made upon its books, and shall not be complete, or shall not pass the title until so made, but they do not control the legal effect of an assignment and delivery of the certificate by the owner. The legal effect of the owner's assignment may be controlled by legislative enactment; for the legislature has the right to declare what forms shall be observed in the transfer of property. But in the absence of any legislative regulation, either by general law or by special charter, the mode of transferring stock should be determined by general principles of law based upon sound reason and public policy. "The right to dispose of and transfer the title being a recognized and universal incident to ownership of property, the exercise of that right should not be trammeled by any restrictions except such as grow out of the nature of the property or the demand of a sound policy."[2]

[1] Cornick v. Richards, 3 Lea (Tenn.) 1; Board of Commissioners v. Reynolds, 44 Ind. 509, 13 Am. L. Reg. N. S. 376, 380, 15 Am. Rep. 821.

[2] Cornick v. Richards, 3 Lea (Tenn.) 1, per Freeman, J. The learned judge continuing, said: "The books are not public records in any proper sense of our law. Why one private individual should be required to effectuate the sale of the property of another in which he has

§ 160. **Statutes of doubtful meaning relating to transfers of stock** in corporations will not be construed to control the recognized rules of the common law in regard to the mode of transfer of such property. Thus in a recent case in Massachusetts it was contended that by force of various statutes authorizing the attachment of shares, requiring returns to the secretary of the commonwealth, and imposing a personal liability on stockholders for the debts of the corporation, there could be no transfer of stock valid against an attaching creditor, unless the transfer had been recorded in the books of the corporation; that although the statutes have not provided in express terms that transfers shall not be valid as to creditors until they are so recorded, yet such is the necessary implication, for otherwise the design of the statutes, requiring registration, and making the shares liable for debts, would be defeated. But the court overruled this objection, saying:[1] "This consideration is not sufficient to control the law as long since settled by the decisions of this court. It requires a clear provision of the charter itself, or of some statute, to take from the owner of such property the right to transfer it in accordance with known rules of the common law; and by those rules the delivering of a stock certificate, with a written transfer of the same to a *bona fide* purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor. It

no title or interest as property by entering the fact in his books, it is not easy to see,— not even if the fact be that the party selling had originally purchased the property from him. Yet this fairly represents the fact in the case of stock in a corporation. The original owner purchases it from the corporation by paying or agreeing to pay what it calls for, receiving a certificate of the fact of such purchase and ownership from the corporation. When the stock is so purchased, however, as we have seen, it is his private individual property, and he may sell it as such or assign it with or without a consideration, and no one can object, creditors and innocent purchasers under other rules of law not being affected, for reasons of public policy, in case the transfer is voluntary without value paid for it. It would seem to follow that whenever the title passed out of the party himself by a fair contract of transfer, no registration law being in the case, and no fraud purposed as against a creditor of the party selling, that his right as against the property ought to end."

[1] Boston Music Hall Asso. v. Cory, 129 Mass. 435, per Colt, J.

would not be in accordance with sound rules of construction to infer, from the provisions of several different statutes passed for the purpose of obtaining information needed to secure the taxation of such property, or for the purpose of subjecting stockholders to a liability for the debts of a corporation, or for protecting the corporation itself in its dealings with its own stockholders, that the legislature intended thereby to take from the stockholder his power to transfer his stock in any recognized and lawful mode. If a change in the mode of transfer be desirable, for the protection of creditors, or for any other reason, it is for the legislature to make it by clear provisions, enacted for that purpose."

§ 161. **The convenience of unrestricted transfers of stock is so great** that it may be said that such transfers are now a necessity. Transfers of stock, not only for purposes of speculation but also for the purposes of security, have now become so important an element in the business transacted every day in all the centers of commerce and trade that it is almost a matter of necessity that the mere delivery of the certificate with a power of transfer should be effectual, not only as between the parties to the transaction, but also as against the assignor's creditors. This practical necessity for an unrestricted transfer of shares of stock has been generally recognized by the courts, in the absence of statutes making a transfer upon the books of the company requisite to the validity of the transfer. Thus, in a recent case in Louisiana the court say:[1] "There is an immense amount of the wealth of the country invested in stocks of the numberless corporations, which have sprung into existence within a few years past. These stocks afford a most convenient and valuable basis of credit; and they are sold to a large amount daily, at all the great commercial centers. The holder who does not wish to sell may pledge his certificates for loans and discounts to an amount approximating their market value, with a reasonable margin for possible depreciation.

[1] Smith v. Slaughter House Co., 30 La. Ann. 1378, 1383.

The pledgee does not desire to become the owner of the stock; and he would not think it necessary, nor would he have the right to surrender the pledged certificates and have the stock transferred to him on the books of the corporation. Nor do we think the validity of the pledge could be made to depend on the giving of notice to the corporation, because the corporation has no power or authority to dispose of the stock or to transfer it, so long as the certificates are not produced and surrendered. If the pledgee were required to have the transfers made on the books of the corporation or to give notice, the value of these certificates as a basis of credit would be greatly impaired, particularly where the pledge is made at a distance from the domicil of the corporation."

There is a very great convenience, not only to persons dealing in stocks, but to merchants and bankers who have occasion to use them as collateral, to be able to give or take an indisputable title without an actual transfer of the shares upon the books of the corporation.[1] The office of the corporation may be far away from the place at which the transaction is had; or the transaction may be one for a temporary purpose, such as a loan for a few days upon stock as security. Then, again, it is customary with all large corporations to close the transfer books whenever dividends are declared, and to keep them closed, perhaps, for weeks at a time; and consequently, during such periods, all transactions must necessarily be had without an actual transfer of the shares.

The latest decisions, as well as those having the highest authority, establish the rule, that in the absence of legislative enactment restricting the transfer of stock to a particular mode, a transfer is complete on delivery of the certificate with a power to transfer, not only between the parties themselves, but when the corporation has unjustifiably refused to make the transfer on its books, against a creditor of the vendor, who, without notice of the transfer, has attached the stock.[2]

[1] Cornick v. Richards, 3 Lea (Tenn.) 1.

[2] Merchants' Nat. Bank v. Richards, 74 Mo. 77, affirming 6 Mo. App. 454; and cases cited in §§ 159–161.

§ 162. **A mere rule of a corporation not authorized by statute can not affect the rights of purchasers or pledgees of stock.** Thus an unauthorized by-law of a corporation, forbidding a transfer of stock when the holder is indebted to the corporation, does not relieve the corporation from the duty of making a transfer upon its books upon the request of one to whom the certificate, accompanied by a power of attorney, has been assigned.[1] "There is no presumption in favor of the right of a corporation to refuse to transfer on its books stock of the company which the shareholder has sold to a *bona fide* purchaser. The certificate represents the property, and if any secret lien upon the property exists, such lien must be shown. The burden is on him who asserts the peculiar privilege to prove it, as restrictions on the free transfer of personal property are not favored, especially as against an innocent purchaser who has paid for the certificate. At common law, and independently of positive provisions of the legislature granting or authorizing the exercise of the power, a corporation can not prohibit the transfer of its shares on account of the indebtedness of the shareholder to the corporation. Where the stock is personal property, restrictions upon its transfer must have their source in legislative action, and the corporation itself can not create these impediments."[2]

[1] Carroll v. Mullanphy Savings Bank, 8 Mo. App. 249, 252.

In this case the by-law under which the corporation refused to make the transfer was one adopted by the directors, and not one made by the corporation. The by-law was considered as of no effect, because the power to make by-laws ordinarily resides solely in the corporation. It would be otherwise where the charter of the corporation gives express power to the directors to make by-laws for the transfer of its shares of stock; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; or where a company's charter provided that its stock should be transferable according to such restrictions as the board of directors should establish, subject to the laws of the state; St. Louis Ins. Co. v. Goodfellow, 9 Mo. 149. And see Spurlock v. Pacific R. Co., 61 Mo. 326, where the power to make by-laws was general.

[2] Carroll v. Mullanphy Savings Bank, 8 Mo. App. 249, per Hayden, J., citing Chouteau Spring Co. v. Harris, 20 Mo. 382, 387; Moore v. Bank, 52 Mo. 377, 379; Bank of Attica v. Manufacturers' Bank, 20 N. Y. 501, 505; Rosenback v. Bank, 53 Barb. 495; Steamship Dock Co. v. Heron, 52 Pa. St. 280.

IV. *Transfers in Blank.*

§ 163. **By general commercial usage a transfer of a stock certificate may be made in blank.** An indorsement in blank of a certificate, or a signing in blank a power of attorney to make a transfer upon the company's books, authorizes any subsequent holder to fill up the assignment or the power of attorney.[1] This right to fill up the blank is not limited to the first taker of the instrument, but may be exercised by any one into whose hands the certificate may come in this way. The blank in the assignment or power may be subsequently filled up by the holder with his own name, so as to entitle him to a transfer upon the books of the company, although the assignment or power be executed under seal.[2] The commercial usage to this effect is well established and judicially recognized in this country.[3] But even without the aid of this usage, assignments in this form would doubtless be upheld by some courts.

In a leading case upon this subject it appeared that the owner of certain shares of bank stock, which were transferable only upon the books of the bank, sent his certificate with a blank power of attorney under seal, and his own promissory note, to

[1] Kortright v. Commercial Bank, 20 Wend. (N. Y.) 91, 22 Wend (N. Y.) 348; Leavitt v. Fisher, 4 Duer (N. Y.) 1; Persch v. Quiggle, 57 Pa. St. 247, Finney's App., 59 Pa. St. 398; United States v. Cutts, 1 Sumner 133; Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. Rep. 369; New Orleans Nat. Banking Asso. v. Wiltz, 10 Fed. Rep. 330; German Union Building Asso. v. Sendmeyer, 50 Pa. St. 67; Holly Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Broadway Bank v. McElrath, 13 N. J. Eq. 24, 105 Ill. 436; Otis v. Gardner (Ill. 1883), 15 Rep. 332.

[2] Bridgeport Bank v. N. Y. & N. H. R. Co., 30 Conn. 231, 273; Strange v. H. & T. C. R. Co., 53 Texas 162; Sewall v. Boston Water Power Co., 4 Allen (Mass.) 277, 81 Am. Dec. 700; Walker v. Detroit Transit Co., 47 Mich. 338, 11 N. W. Rep. 187.

[3] When a general usage has been judiciously ascertained and established, it becomes a part of the law merchant "which courts of justice are bound to know and recognize." Brandao v. Barnett, 12 Cl. & F. 787, 805, per Lord Campbell; Pitot v. Johnson, 33 La. Ann. 1286; Blouin v. Hart, 30 La. Ann. 714; State v. Jeffersonville Nat. Bank, 89 Ind. 302; Merchants' Nat. Bank v. Richards, 74 Mo. 77, affirming 6 Mo. App. 454; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. Rep. 261; McClintock v. Central Bank, 120 Mo. 127, 24 S. W. Rep. 1052; Van Cise v. Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. Rep. 897; Spreckels v. Macfarlane, 9 Hawaii 166.

an agent to use in obtaining a loan. Subsequently this agent obtained a large loan upon these securities and absconded with the money. The pledgee filled up the blank transfer and power of attorney and demanded a transfer of the shares to himself upon the books of the bank; but the bank refused to allow this. In a suit by the pledgee against the bank for such refusal the pledgee was held to be entitled to recover. Chief Justice Nelson, in denying a motion for a new trial, said that the filling of the blanks in the transfer and in the power of attorney was in strict conformity with the universal usage of dealers in the negotiation and transfer of stocks, according to the proof on trial.[1] "Even without the aid of this usage there could be no great difficulty in upholding the assignment; the execution in blank must have been for the express purpose of enabling the holder, whoever he might be, to fill it up. If intended to have been filled up in the name of the first transferee, there would have been no necessity of its execution in blank; the owner might have completed the instrument. The usage, however, is well established, and was fully understood by the owner, as he made the transfer in conformity to it, and he, or those setting up a claim under him, should not now be permitted to deny its validity. The filling up is but the execution of an authority clearly conveyed to the holder, is lawful in itself, and convenient to all parties, as it avoids the necessity of needlessly multiplying transfers upon the books."[2]

If the owner of shares of stock indorses the certificate in blank and intrusts it to an agent to obtain a loan upon a pledge of the certificate as collateral security, one dealing with the agent without knowledge of the principal's instructions would doubtless be justified in purchasing the shares; and if the transaction as between the agent and purchaser was an absolute sale, the principal would doubtless be estopped to set up his secret instructions to his agent, and would not be allowed to redeem the stock as held upon a pledge.[3]

[1] Kortright v. Commercial Bank, 20 Wend. (N. Y.) 94, per Nelson, C. J.; approved in Matthews v. Massachusetts Nat. Bank, 1 Holmes 396, 407.

[2] Kortright v. Commercial Bank, on appeal, 22 Wend. 348.

[3] See Morrell v. Kelley, 157 Mass. 126, 31 N. E. Rep. 755. In this case it

§ 164. **The decisions of the English courts to the contrary** have been influenced chiefly by a rigid adherence to the technical rules of the common law in relation to instruments under seal, though the policy of the stamp laws is said to have had some influence in the same direction. It is an ancient rule of the common law that an instrument under seal must be wholly written before sealing and delivering it. No blanks in any essential part of such an instrument can be filled in after the delivery of it. Lord Mansfield attempted to break down this rule in the case of Texia v. Evans;[1] but half a century afterwards this case was overruled, and the ancient rule re-established. This still remains the rule in England, and is adopted in the greater number of states in this country.[2]

But while in this country, even in those states in which this rule of the common law prevails, transfers of shares by assignments or powers of attorney in blank are allowed by virtue of the general commercial usage, in England no general exception in regard to such transfers has been made. The case in which Lord Mansfield's new doctrine was finally repudiated arose in regard to the validity of a transfer of shares by an assignment in blank, which was afterwards filled up by inserting the purchaser's name.[3] The charter of the corporation required a conveyance of its shares to be made by an instrument under seal. Baron Parke, delivering the judgment of the court, said: "There is no authority that shows that an instrument which, when executed, is incapable of having any operation, and is no deed, can afterward become a deed, by being completed and delivered by a stranger, in the absence of the party who executed it, and unauthorized by instrument under seal."

In a later case the owner of various securities, who kept his

was found as a fact that the transaction was a pledge, so that the question of law was not considered.

[1] Cited and stated by Wilson, J., in Master v. Miller, 1 Anstr. 225.

[2] See, on this subject, 1 Jones on Mortgages, § 90.

[3] Hibblewhite v. M'Morine, 6 M. & W. 200. The principle of this decision has been affirmed in Davidson v. Cooper, 11 M. & W. 778, 793; Enthoven v. Hoyle, 13 C. B. 373; Humble v. Langston, 7 M. & W. 517; Eagleton v. Gutteridge, 11 M. & W. 465.

certificates in his broker's safe at a London bank, was fraudulently induced by the broker to execute and deliver to him several deeds of transfer in blank. The broker filled up two of the deeds, making each of them transfer to a confederate five hundred shares of stock in the defendant railway company. The company having transferred the shares to the transferee named, the owner brought suit against the company; and it was held that the transfers were void, and the company was held liable, though the plaintiff had been guilty of culpable negligence.[1] But if the company's articles of association do not require transfers to be made by deed, they may be executed in blank and the holder may afterwards fill them up.[2] The validity of transfers in blank seems also to be recognized, so far as to impose upon the holder the obligation to pay calls upon the shares.[3]

§ 165. **A power of attorney to transfer stock, though under seal, may be executed in blank** just as the assignment upon the back of the certificate may be executed in this way. Such a power of attorney, delivered with the certificate, is evidence of an implied authority to fill up the power with the name of an attorney to make the transfer upon the books of the corporation. It is customary to make the power in this form, and there is no question in regard to the validity of such a power, when it has been filled up according to the intention of the owner.[4] But when the blank has been once filled, the instru-

[1] Swan v. North British Australian Co., 8 Jur. 940.

[2] *In re* Tahiti Cotton Co., L. R. 17 Eq. 273; *Ex parte* Swan, 7 C. B.(N.S.) 400.

[3] Walker v. Bartlett, 18 C. B. 845.

[4] German Union Building Asso. v. Sendmeyer, 50 Pa. St. 67; Persch v. Quiggle, 57 Pa. St. 247; Rice v. Gilbert, 173 Ill. 348, 351, 50 N. E. Rep. 1087.

In an earlier case in this state, however (Denny v. Lyon, 38 Pa. St. 98), this commercial usage was condemned, Woodward, J., saying: "The cashier of the bank swears that the name of the transferee is usually not inserted in the power of attorney, and that it is more convenient not to have it inserted. We know that this is commercial usage; it was probably originated by the banks; if not, they have countenanced it, and thus brought people to practice it, and yet it is a vicious usage, which no considerations of convenience are sufficient to

ment becomes complete; and the holder of the power has no authority to alter or erase the name inserted and insert another. Thus, if the owner of a certificate of stock intrusts it to another, with a power of attorney in blank, to enable him to make a specific loan, and the loan is made and afterwards is paid, and the stock is returned to the borrower, who then erases the name of the pledgee, and inserts the name of a creditor to whom he was already indebted to a large amount, upon the application of the original owner of the shares, the creditor was enjoined from transferring the shares to his own name.[1]

An assignment of the certificate, and a power of attorney to transfer the stock, may both be executed in blank; and if the owner of the certificate insert his name in that, and in the power the name of another, an effectual demand upon the corporation for a transfer of the stock can be made by the owner, without the attorney's joining in it.[2]

§ 166. **The death of the pledgor of a certificate indorsed by him in blank does not revoke the authority of the pledgee** to fill up a written transfer of the certificate to himself or to another; and it does not matter in this respect that the certificate by its terms is transferable only at the office of the corporation by appearance of the holder in person, or by attorney.[3]

§ 167. **The signing of a transfer in blank on a certificate of stock is a warranty of the genuineness of the certificate.** The rule is the same, and rests upon the same grounds, as that established with reference to negotiable instruments, to the effect

justify. *Malus usus abolendus est.* A power of attorney, signed, generally sealed, and duly delivered, what is it but a finished legal instrument? Who may alter that paper writing to the prejudice of another, without incurring liability to the charge of forgery? If commercial usage permits the insertion, erasure, and subsequent re-insertion here, what other legal instrument may not commercial usage tamper with in like manner?"

[1] Denny v. Lyon, 38 Pa. St. 98, 80 Am. Dec. 463.

[2] Cushman v. Thayer Manufacturing Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315.

[3] Fraser v. Charleston, 11 S. C. 486; Leavitt v. Fisher, 4 Duer (N. Y.) 1, per Duer, J.

that every indorser holds himself out as possessing a clear title to the paper, and as conferring such a title upon his indorsee.

It becomes of importance, therefore, that one taking a certificate in his own name, as security for a loan, should know the genuineness of the certificate, not only with a view to the security of the loan, but with a view to avoiding a loss greater, perhaps, than the whole of the loan, through putting the certificate in circulation after the payment of the loan, by indorsing a transfer of it in blank. This point is forcibly illustrated in the case of Matthews v. Massachusetts National Bank.[1] This bank made a loan upon a certificate of stock issued as collateral directly to the bank for two shares of the stock of the Boston and Albany Railroad Company, which certificate the borrower, before delivering to the bank, fraudulently altered, so as to purport to be for two hundred shares. The bank received the certificate in good faith as security for a loan, and upon the payment of the loan the bank, by its cashier, signed a transfer in blank upon the back of the certificate, and delivered it to the borrower. A short time afterwards the same borrower obtained from a third person another and larger loan, upon a pledge of the certificate, still having the bank's assignment in blank upon it. This lender took the certificate in good faith, supposing it to be genuine, but very soon discovered the fraudulent alteration, and brought suit against the bank for the recovery of the damages he had sustained. The question presented was whether the bank had, by signing the blank transfer, so far warranted the genuineness of the certificate that it was estopped from setting up the forgery as a defense to the action, and the bank was held liable.

It was contended in behalf of the bank that the transfer created no liability to any subsequent holder of the certificate, because the circumstances under which it was taken and surrendered indicated that the transfer was made solely for the purpose of restoring the pledge to the borrower after he had

[1] 1 Holmes 396. See note to this case, 14 Am. Law Reg. N. S. 153.

paid this loan. But the court replied that there was nothing to show that the subsequent lender had any knowledge of any such intention on the part of the bank; that although the certificate purported that the bank held the shares as collateral, it did not show for whose debt they were collateral; that such a certificate, with a transfer in blank, might, in the ordinary course of dealing, pass through the hands of many successive purchasers, and the possession of it would afford no indication that the holder of it was the person who had originally transferred it to the bank as collateral; that if the bank had enforced payment of the loan by a sale of the stock, and had assigned the certificate in this form, the purchaser would have been in the same condition as the subsequent pledgee; and if this pledgee had dealt with the purchaser, he would have received no better evidence of title against the bank than he in fact received from the borrower himself. The mere words "as collateral" in the instrument do not tend to put the purchaser on inquiry, except so far as relates to the authority of the bank to dispose of the collateral as between the bank and its debtor. If inquiry had been made of the bank, it would only have resulted in the information that the bank had made a loan upon the certificate, and the loan having been paid, the assignment was made in blank by the joint act and consent of the debtor and the bank. There would have been nothing in this information to lead the inquirer to doubt the genuineness of the certificate to which the bank had given currency by its signature. Neither could the bank contend, with any show of reason, that the subsequent pledgee was negligent in not inquiring at the office of the railroad corporation. If the duty of making such inquiry was incumbent on any one, it was incumbent on the bank to ascertain the genuineness of the instrument before giving currency to it, and lulling suspicion and doubt by the responsibility of its signature. One taking the certificate in this form might reasonably suppose that the bank had obtained the certificate itself from the railroad company in the usual way, thus preventing the possibility of fraud or forgery. The bank, in fact, negligently placed confidence in the borrower to obtain a

transfer from the railroad company, instead of obtaining it directly. But the negligent act, which especially imposed upon the bank a liability in this case, was that it delivered the forged instrument to the borrower, assigned in blank, and authenticated by the signature of its proper officer, thus giving it a currency which it would not have possessed had the transfer been made directly to the borrower. If the bank had intended merely to revest in the borrower whatever it acquired from him, it would have been perfectly easy to have limited the transfer to that extent only. If the conditions upon which the apparent right of control which the bank conferred upon the borrower were not expressed upon the face of the instrument, but remained in confidence between the bank and the borrower, the case is not distinguishable in principle from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power. One of two innocent parties must suffer; and the courts have repeatedly held that the party must suffer who has exhibited the greater degree of negligence.

V. *Transfer by Delivery of Certificate as Between the Parties.*

§ 168. **The effect of a transfer of stock by delivery of the certificate with a power of transfer** is, therefore, to be considered: 1. As between the parties to the transfer; 2. As between them and the corporation itself; and 3. As between them and attaching creditors.

Whatever be the view taken of the necessity of a transfer upon the books of a corporation in order to protect the title of such assignee as against subsequent attaching creditors of the assignor, it is agreed that, as between the parties themselves, the title passes by indorsement and delivery of the certificate, without any entry of the transfer upon the books of the corporation;[1] or even without filling up the transfer, where this has been signed in blank.[2]

[1] Johnston v. Laflin, 103 U. S. 800; Bank v. Lanier, 11 Wall. 369; Nat. Bank v. Watsontown Bank, 105 U. S. 217; *Ex parte* Dobson, 2 Mont., D. & De G. 685; Dickinson v. Central Bank, 129 Mass. 279, 37 Am. Rep. 351; Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515; Fitchburg Savings Bank v. Torrey, 134 Mass. 239, Mass. Law Rep., May 3, 1883; Cherry v. Frost, 7 Lea (Tenn.) 1, per Cooper, J.

[2] Otis v. Gardner, 105 Ill. 436, 15

A by-law requiring a transfer to be made upon the books of a corporation does not restrict the owner in his right to transfer his stock, or give the corporation the power to refuse to register a *bona fide* transfer. As between the parties, the sale is complete when the certificate is assigned with power to make a transfer upon the books of the corporation.[1]

Rep. 332; Ross v. Southwestern R. Co., 53 Ga. 514; Comeau v. Guild Farm Oil Co., 3 Daly (N. Y.) 218; Smith v. Crescent City Stock Landing Co., 30 La. Ann. 1378.

[1] Johnston v. Laflin, 5 Dill. 65, 103 U. S. 800, 17 Abb. L. J. 146; Thompson's Nat. Bank Cases, 343; Bank v. Lanier, 11 Wall. 369; Lacombe v. Forstall, 123 U. S. 562, 8 S. C. Rep. 247.

California: Brittan v. Oakland Bank, 124 Cal. 282, 57 Pac. Rep. 84; Spreckels v. Nevada Bank, 113 Cal. 272, 45 Pac. Rep. 329.

Dakota: Van Cise v. Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. Rep. 897.

District of Columbia: National Safe Dep. Sav. & Trust Co. v. Gray, 12 D. C. App. Cas. 276.

Georgia: Ross v. Southwestern R. Co., 53 Ga. 514; Railroad Co. v. Thomason, 40 Ga. 411.

Illinois: Rice v. Gilbert, 173 Ill. 348, 50 N. E. Rep. 1087; Kellogg v. Stockwell, 75 Ill. 68; Otis v. Gardner, 105 Ill. 436.

Iowa: Des Moines Nat. Bank v. Warren Co. Bank, 97 Iowa 204, 66 N. W. Rep. 154; Courtright v. Deeds, 37 Iowa 503.

Kentucky: Bank of America v. McNeil, 10 Bush 54.

Maryland: Baltimore City Passenger R. Co. v. Sewell, 35 Md. 238.

Massachusetts: Andrews v. Worcester, N. & R. R. Co., 159 Mass. 64, 33 N. E. Rep. 1109; Dickinson v. Cent. Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351; Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515; Sargent v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; Fitchburg Savings Bank v. Torrey, 134 Mass. 239, Mass. Law Rep., May 3, 1883.

Minnesota: Baldwin v. Canfield, 26 Minn. 43, 1 N. W. Rep. 261.

Missouri: Merchants' Nat. Bank v. Richards, 6 Mo. App. 454; Moore v. Bank, 52 Mo. 377; Carroll v. Mullanphy Sav. Bank, 8 Mo. App. 249.

New Jersey: Mount Holly L. & M. Turnp. Co. v. Ferree, 17 N. J. Eq. 117.

New York: Leavitt v. Fisher, 4 Duer 1; Leitch v. Wells, 48 N. Y. 585; Commercial Bank v. Kortright, 22 Wend. 348; Munn v. Barnum, 24 Barb. 283; Orr v. Bigelow, 20 Barb. 21; Bank v. Smalley, 2 Cow. 770; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Grymes v. Hone, 49 N. Y. 17.

Pennsylvania: German Union Asso. v. Sendmeyer, 50 Pa. St. 67; United States v. Vaughan, 3 Binn. 394; Lightner's App., 82 Pa. St. 301.

Rhode Island: Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291; Beckwith v. Burrough, 13 R. I. 294.

South Carolina: Fraser v. Charleston, 11 S. C. 486.

Tennessee: Parker v. Bethel Hotel Co., 96 Tenn. 252, 284, 34 S. W. Rep. 209; Cornick v. Richards, 3 Lea 1, 25; West Nashville Planing-Mill Co. v. Nashville Sav. Bank, 86 Tenn. 252, 6 S. W. Rep. 340; Caulkins v. Gas Light Co., 85 Tenn. 683, 4 S. W. Rep. 287.

§ 169. **By a delivery of a stock certificate with an indorsement in blank or with a power of transfer, the title passes as between the parties** to the transaction; and in this respect, it matters not whether such transfer be deemed to pass a legal or an equitable title.[1] In a case relating to such a transfer of shares of a national bank, Mr. Justice Field, in delivering the judgment of the supreme court of the United States, said:[2] "The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller's creditors. Purchasers and creditors are only bound to look to the books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or any one he may name, to transfer it on the books of the company, and the price is paid."

When the owner of corporate stock has indorsed his certificate in blank, and delivered it as security for a pledge, he has put it in the power of the pledgee to negotiate the stock for value, and if the first pledgee transfers the certificate to another in pledge the original owner can not recover the stock from the last pledgee without refunding, or offering to refund, the amount

Texas: Seeligson v. Brown, 61 Tex. 114; Strange v. Houston and Texas Cent. R. Co., 53 Tex. 162, 10 Rep. 28.

Vermont: Noyes v. Spaulding, 27 Vt. 420.

West Virginia: Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. Rep. 646.

Wisconsin: Plankinton v. Hildebrand, 89 Wis. 209, 61 N. W. Rep. 839.

[1] National Bank v. Watsontown Bank, 105 U. S. 217, 4 Morrison's Trans. 400; Johnston v. Laflin, 103 U. S. 800; Carroll v. Mullanphy Savings Bank, 8 Mo. App. 249; Merchants' Nat. Bank v. Richards, 6 Mo. 454; Johnson v. Underhill, 52 N. Y. 203; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Castle v. Smith, 7 Hawaii 579.

[2] Johnston v. Laflin, 103 U. S. 800; and see National Bank v. Watsontown Bank, 105 U. S. 217; Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515.

advanced upon it by the last pledgee.[1] Where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence he caused or allowed to appear to be vested in the party making the conveyance.[2]

§ 170. **Some authorities hold that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable,** in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books;[3] that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the *entire legal title* to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections. In the case of Kortright v. Commercial Bank of Buffalo,[4] Chancellor Walworth, in a dissenting opin-

[1] McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 329, 7 Am. Rep. 341; Brittan v. Oakland Bank, 124 Cal. 282, 57 Pac. Rep. 84.

[2] McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 329, 7 Am. Rep. 341, per Rapallo, J.

[3] *New York:* Cushman v. Thayer Manufacturing Jewelry Co., 76 N. Y. 365, 371, 32 Am. Rep. 315, per Miller, J.; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, per Rapallo, J.; Smith v. American Coal Co., 7 Lans. 317; Hill v. Newichawanick Co., 48 How. Pr. 427; Leitch v. Wells, 48 N. Y. 585; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313.

In Holbrook v. New Jersey Zinc Co., 57 N. Y. 623, it is declared that "one who takes an assignment of a stock certificate, as between him and the transferrer takes the whole title, both legal and equitable."

[4] 20 Wend. 91; 22 Wend. 348.

ion, strenuously maintained, in conformity with his previous decision in Stebbins v. Phœnix Ins. Co.,[1] that by a transfer not on the books, the transferee acquired only an equitable right to or lien on the shares, and that, having but an equitable right or lien, he took subject to all prior equities which existed in favor of any other person from whom such assignment was obtained. But his view was overruled by the majority of the court. The action was at law in assumpsit, brought by the holder of the certificate and power, for a refusal to permit him to make a transfer on the books, and the question of his legal title was necessarily involved in the case. The judgment therein must therefore be regarded as a direct adjudication that, as between the parties, *the legal title* in the shares will pass by delivery of the certificate and power. This was reasserted in the New Haven Railroad case,[2] notwithstanding what was said in the Mechanics' Bank case.[3]

The Court of Appeals of New York, in a case already cited, say:[4] "By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by fraudulent transfer on the books of the company by the registered holder to a *bona fide* purchaser;[5] but in this respect he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. He would have an action against the corporation, for allowing such a transfer in violation of his rights.[6] He also takes the risk of the collection of dividends by his assignor, and the risk of any lien the corporation may have on the shares. But in other respects his title is complete."

[1] 3 Paige (N. Y.) 350, 356.

[2] 34 N. Y. 30, 80.

[3] 13 N. Y. 625.

[4] McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 332, 7 Am. Rep. 341, per Rapallo, J.

[5] New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 80. See, also, Smith v. Am. Coal Co., 7 Lans. (N.Y.) 317.

[6] See, also, Cushman v. Thayer Manufacturing Jewelry Co., 76 N. Y. 365, 371, 32 Am. Rep. 315.

§ 171. **But on the other hand other courts hold that the delivery of a certificate with a power of transfer, gives the holder nothing more than an equitable title.**[1] Such a transfer makes the holder presumptively the equitable owner of the shares, and if he has given value for them without notice of any intervening equity, his title as such owner can not be impeached. "The certificate of stock, accompanied by the power of attorney authorizing the transfer of the stock to any person, is *prima facie* evidence of equitable ownership in the holder, and renders the stock transferable by the delivery of the certificate. And when the party in whose hands the certificate is found is shown to be a holder for value and without notice of any intervening equity, his title as such owner can not be impeached. The holder of the certificate may insert his own name in the power of attorney and execute the power, and thus obtain the legal title to the stock, whenever the loan for which it was hypothecated becomes due, or whenever, by the terms of his contract, he becomes entitled to the stock. And such a power is not limited to the person to whom it was first delivered, but inures to the benefit of each *bona fide* holder, into whose hands the certificate and power may pass."[2]

VI. *Such Transfers as between the Parties and the Corporation.*

§ 172. **But as against the corporation itself a transfer not entered upon the books of the company is, as a general rule, not binding upon it.**[3] The corporation is not bound to recog-

[1] Black v. Zacharie, 3 How. 483; Mount Holly, etc., Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Bank of America v. McNeil, 10 Bush (Ky.) 54. See State Ins. Co. v. Sax, 2 Tenn. Ch. 507; United States v. Vaughan, 3 Binn. (Pa.) 394, 398; Willis v. Philadelphia & Darby R. Co., 6 Weekly Notes of Cases, 461; Bruce v. Smith, 44 Ind. 1, 5. In Bank of America v. McNeil, 10 Bush (Ky.) 54, the court spoke of an assignment of the certificate, with a power to transfer, where the corporation's charter provides for a transfer upon its books, as a symbolical delivery of the stock, effectual against persons having actual notice of it.

[2] Mount Holly, etc., Turnpike Co. v. Ferree, 17 N. J. Eq. 117, per Green, Chancellor.

[3] Stockwell v. St. Louis Mercantile Co., 9 Mo. App. 133; Becher v. Wells Flouring Mill Co., 1 Fed. Rep. 276;

nize as stockholders any persons who do not appear to be such upon the corporation's books. Thus an assignee of shares can not at law recover a dividend declared by the company until his assignment has been entered upon the company's books, as required by its charter and by-laws.[1] On the other hand, until an assignment has been made and entered in the manner prescribed, the assignee does not become liable to pay assessments laid upon the shares.[2] A lien given by the charter and by-laws of a corporation upon the shares of its stockholders, may be enforced by it against the stockholder of record,[3] and can not be enforced against an equitable assignee, no transfer having been executed upon its books.[4]

§ 173. **An actual transfer upon its books is necessary as against the corporation to make an available and complete title;** and such a transfer is necessary even in the absence of any provision in the charter, or in the stock certificate requiring such a transfer.[5] This was the case in Bank of Commerce's Appeal.[6] A shareholder in a building association obtained from this bank a loan upon his certificate of stock, accompanied by a power of attorney to transfer it. By the articles of association the shareholder was entitled to a loan from the association of a certain sum upon each share, and he subsequently borrowed from the association the full amount to which he was entitled, and transferred his stock to it, although the bank still held his certificate. The charter of the association expired while this state of facts continued, and the assets were distributed by the officers amongst the stockholders shown to be such by its books, including the association itself as pledgee of the stock of this shareholder, without notice from

Laing v. Burley, 101 Ill. 591; Otis v. Gardner, 105 Ill. 436, 15 Rep. 332; Manning v. Quicksilver Mining Co., 24 Hun (N. Y.) 360.

[1] Oxford Turnpike Co. v. Bunnel, 6 Conn. 552.

[2] Marlborough Manuf. Co. v. Smith, 2 Conn. 579.

[3] Union Bank v. Laird, 2 Wheat. 390.

[4] Helm v. Swiggett, 12 Ind. 194.

[5] Denny v. Lyon, 38 Pa. St. 98, 80 Am. Dec. 463; Sitgreaves v. Farmers' & Mechanics' Bank, 49 Pa. St. 359, 365.

[6] 73 Pa. St. 59.

the bank. It was held that the bank had no claim under its certificate. The court, by Agnew, Justice, say: "The assignment of the certificate is only an equitable transfer of the stock, and to be made available must be produced to the corporation and a transfer demanded. As between adverse claimants of the certificate, the possession of it with the transfer upon it is often the test of title. But when the corporation itself is not dealing with its stockholder on the security of his stock, and is merely performing a corporate duty, its own record is all it needs to consult, for whoever would demand the privileges of a stockholder should produce the evidence of his title and ask to be permitted to participate. The officers acted officially as the trustees of the expired corporation, to settle its affairs under the powers conferred by the law, and in doing so made their distribution, according to the record of the corporation, which exhibited the membership of the corporation. In doing this, without any notice from the bank of its equitable assignment of the stock, clearly they were not guilty of any negligence, while the loss of the bank was attributable to its own negligence, and negligence on their part is the only ground of its bill."

§ 174. **A provision that a certificate of stock shall be transferable only upon the books of the corporation is designed primarily for the safety and security of the corporation,** and incidentally only for the safety of purchasers.[1] Upon this point the supreme court of Louisiana say: "The by-law which requires transfers of stock to be recorded on the books of the corporation regulates merely the respective rights of the corporation and the individual stockholders. No one can claim to be

[1] Fraser v. Charleston, 11 S. C. 486; Merchants' Nat. Bank v. Richard, 6 Mo. App. 454; Insurance Co. v. Goodfellow, 9 Mo. 150; Johnston v. Laflin, 103 U. S. 800; Carroll v. Mullanphy Sav. Bank, 8 Mo. App. 249; Chouteau Spring Co. v. Harris, 20 Mo. 382; Moore v. Bank, 52 Mo. 377, 379; Parker v. Bethel Hotel Co., 96 Tenn. 252, 284, 34 S. W. Rep. 209; Smith v. Railroad, 91 Tenn. 221, 238, 18 S. W. Rep. 546. *Dicta* to the contrary in White v. Salisbury, 33 Mo. 150, and Boatmen's Ins. Co. v. Able, 48 Mo. 136, are not considered as law.

a stockholder, and to exercise the rights of a corporator, in virtue of a sale of stock to him, until the corporation has taken cognizance of the sale, and, by transfer on its books, has substituted the purchaser for the seller. Whether one has acquired the character and the rights of a corporator, is a question to be determined by the laws of the corporation. Whether a purchaser has acquired a good and perfect title to any property or thing, tangible or intangible, is a question to be solved by the general laws of the state applicable to the sale and transfer of such objects."[1]

It has been argued that an actual transfer upon the books of a corporation is not the only and essential evidence of ownership, except for the corporation itself, because the books of a corporation are of a private nature and are not open to public inspection. "It is not, therefore, to apprise the world and prevent it from giving a false credit to the apparent owner of stock that the transfer thereof is required to be made on the books of the bank in the presence of one of its officers. The great object of requiring transfers to be made in this manner, is to prevent all difficulty that otherwise might arise with those who have the direction and management of the corporation in ascertaining the persons who are to be regarded and treated by them as the owners of the stock and as corporators. No persons, therefore, are to be regarded by them as such, excepting those in whose names the stock is entered and holden."[2]

§ 175. **As against the corporation a transfer upon its books is necessary to confer a legal title.** The mere transfer of the certificate, although accompanied by a written direction to the secretary of the corporation to make the necessary transfer upon the books, gives the assignee an equitable title only, so far as the corporation is concerned, until the transfer is actually made upon the books.[3] "The certificates do not consti-

[1] Smith v. Slaughter-House Co., 30 La. Ann. 1378, 1382.

[2] Commonwealth v. Watmough, 6 Whart. (Pa.) 117, 139.

[3] Becher v. Wells Flouring Mill Co., 1 Fed. Rep. 276.

tute property in the corporation; they are the muniments of title, but it is the shares of stock which constitute the property, and the persons whose names appear upon the books of the corporation are presumed to be the stockholders; they have the right to vote and participate in directing the policy of the company.'"[1] Until the transfer is made upon the books the corporation does not recognize an assignee as a stockholder. If an assignee having the proper muniments of title should make a demand upon the proper officers of the corporation for a transfer upon the books, and the corporation should neglect or refuse to make it, relief could be had by proper legal proceedings.

§ 176. **A transfer of shares upon the books of a corporation without a surrender of the outstanding certificate** is ineffectual when the certificate issued by the corporation formally provides that the shares are transferable on the books of the corporation, in person or by attorney, *only on the surrender of the certificate*. A national bank having issued such certificates, made a loan to a stockholder upon a transfer of shares to the bank without his producing or surrendering his certificate, which he had already sold and assigned to a purchaser for value with a power of attorney to transfer; but the purchaser delayed obtaining a transfer upon the books of the bank until the bank in the meantime made the loan to the stockholder and in fact sold a part of the stock upon the borrower's default. In a suit by the purchaser of the stock against the bank for refusing to transfer the stock to him upon the books, the supreme court of the United States held the bank liable.[2] The bank in allowing a transfer to itself of the stock upon its books while the certificate was outstanding in the hands of a *bona fide* purchaser, was guilty of a breach of corporate duty,

[1] Becher v. Wells Flouring Mill Co., 1 Fed. Rep. 276, per Nelson, J.

[2] Bank v. Lanier, 11 Wall. 369. And see New York & New Haven R. Co. v. Schuyler, 34 N. Y. 30; Cushman v. Thayer Manufacturing Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315; Hall v. Rose Hill & Evanston Road Co., 70 Ill. 673; Johnston v. Laflin, 5 Dill. 65, affirmed, 103 U. S. 800; Strange v. Houston & Tex. Cent. R. Co., 53 Tex. 162.

and must render satisfaction to the purchaser. "He is told, under the seal of the corporation," said Mr. Justice Davis, delivering the opinion of the court, "that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates."

This decision was made not upon the ground of the negotiability of the certificate, but upon the ground that the corporation was guilty of a breach of corporate duty in allowing a transfer to be made without a surrender of the certificate which in terms provided that the shares should be transferable on the books of the bank, in person, or by attorney, only on the surrender of the certificate. "The power to transfer their stock," say the court,[1] "is one of the most valuable franchises conferred by congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate to any advantage. It is in obedience to this requirement, that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable."

[1] Bank v. Lanier, 11 Wall. 369, 377, per Davis, J.

§ 176a. **Shares of stock are taxable to a pledgor in whose name they stand upon the books of the corporation.** Although the shares have been pledged as collateral security for loans, with power in the pledgee to transfer them to his own name, and in case the loans are not paid, to sell them, so long as they stand in the name of the pledgor on the books of the company, they are properly taxable to him.[1] It is not the policy of the law to have taxes upon pledged property assessed to the pledgee even when transferred to him.[2]

VII. *Such Transfers as between the Parties and their Creditors.*

§ 177. **Whether an unregistered transfer passes the legal title to the stock as well as the equitable,** is a question upon which the decisions are not in harmony. This question is one of practical importance, because upon the answer to this depends the solution of the practical question whether such a transfer is effectual against the creditors of the assignor before the transfer is recorded upon the books of the company. If the legal as well as the equitable title passes by a delivery of the certificate, with a power of transfer, then of course the stock is not subject as the property of the assignor to attachment or levy of execution. But if such a transfer passes only the equitable title, while this may be good as between the parties, it is not good as against creditors of the assignor until the transfer is registered upon the books of the corporation, or at least until notice has been given it of such transfer.

§ 178. **What is the effect of a sale of stock on execution against the registered owner,** and the issuing of a certificate by the corporation to the purchaser at such sale without notice that the registered owner had already transferred his certificate in pledge for a loan? Such a case was before the circuit court of the United States for the Southern District of New York,

[1] Ratterman v. Ingalls, 48 Ohio St. 468, 28 N. E. Rep. 168.

[2] Waltham Bank v. Waltham, 10 Met. 334; Tucker v. Aiken, 7 N. H. 113.

which held that the corporation was not liable for the value of the stock to the prior pledgee of the certificate. Stock of a bank in Connecticut was registered in the name of a resident of New York, who pledged it to a bank in the latter state for a loan made to him by an unregistered transfer of the certificate. A creditor of the registered owner attached the stock and sold it on execution in proceedings regularly conducted in Connecticut. The stock was by the terms of the certificate "transferable at the bank, in person or by attorney." These words were held to mean that the stock was transferable *only* at the bank; and the transfer of the certificate was held not to operate as a transfer of the stock, except as against the registered owner. The pledgee could obtain a valid title to the stock, except as against the pledgor, only by having it transferred, or, at least, by giving notice to the corporation of the transfer of the stock before it was sold on execution, and a new certificate issued to the purchaser.[1]

But while in some states a requirement by by-law of the corporation that stock shall be transferred only upon the books of the corporation is deemed sufficient to make that mode exclusive, except as between the parties themselves, in other states nothing less than a provision of the company's charter, having the force of a public statute, is deemed sufficient to prevent an unregistered transfer from being complete and effectual against every one but the corporation itself.

§ 179. **As against creditors attaching stock with knowledge of a prior assignment** of the equitable title by a transfer of the certificate, there is no doubt that such equitable transfer will prevail.[2] Mr. Justice Story upon this point said:[3] "Courts of

[1] Williams v. Mechanics' Bank of New Haven, 5 Blatchf. 59.

[2] Black v. Zacharie, 3 How. 483, 512; Scripture v. Soapstone Co., 50 N. H. 571; Van Cise v. Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. Rep. 897; Barse Live Stock Co. v. Range Valley Cattle Co., 16 Utah 59, 50 Pac. Rep. 630. A corporation can not acquire a lien upon the shares of a stockholder of record after receiving notice of an equitable assignment of the shares. Bank of America v. McNeil, 10 Bush (Ky.) 54; Conant v. Reed, 1 Ohio St. 298.

[3] Black v. Zacharie, 3 How. 483, 512.

law, as well as courts of equity, are constantly, in all states where the common law prevails, in the habit of holding a prior assignment of the equitable interest in stock, as superseding the rights of attaching creditors, who attach the same with a full knowledge of the assignment. It is immaterial in such case that the charter of the corporation provides that no transfer of stock shall be valid until it is entered or registered in a book to be kept by the corporation for that purpose. This is manifestly a regulation designed for the security of the corporation itself, and of third persons taking transfers of the stock without notice of any prior equitable transfer. It relates to the transfer of the legal title, and not of any equitable interest in the stock subordinate to that title." And so a judgment creditor buying stock at an execution sale, which he then knows has been previously transferred by an unrecorded assignment of the debtor, acquires no better title than the debtor himself had.[1]

The mere fact that a certificate of stock, when offered in pledge, is in the name of another person, is not sufficient to charge the pledgee with notice that the stock belongs to the person in whose name it stands, when the latter has made an assignment of the certificate in blank, or has delivered it with a power of attorney in blank.[2]

Such a transfer is moreover complete as against a creditor of the pledgor when the corporation has unjustly refused to make the transfer on its books, and the creditor without notice of the transfer has attached the stock.[3]

[1] Newberry v. Detroit & Lake Superior Iron Manufacturing Co., 17 Mich. 141; May v. Cleland (Mich.), 44 L. R. A. 163; McLean v. Charles Wright Medicine Co., 96 Mich. 479, 56 N. W. Rep. 68; Weston v. Bear River Co., 6 Cal. 425, 5 Cal. 186, 63 Am. Dec. 117; Blakeman v. Puget Sound Iron Co., 72 Cal. 321, 13 Pac. Rep. 872; Cheever v. Meyer, 52 Vt. 66; Kellogg v. Stockwell, 75 Ill. 68; Gemmell v. Davis, 75 Md. 546, 23 Atl. Rep. 1032, 32 Am. St. 416; Guarantee Co. of N. A. v. East Rome Town Co., 96 Ga. 511, 23 S. E. Rep. 503; Finney's Appeal, 59 Pa. St. 398.

[2] Felt v. Heye, 23 How. (N. Y.) Pr. 359.

[3] Merchants' Nat. Bank v. Richards, 6 Mo. App. 454; Strange v. Houston & T. C. R. Co., 53 Tex. 162.

§ 180. **As already intimated, transfers of stock are in many states regulated by statute.** These statutes are quite dissimilar in their terms. They were not all enacted for the same purpose. In some states transfers are made invalid except as between the parties, unless recorded upon the books of the corporation; while in other states transfers by indorsement and delivery of the certificates are made valid, not only between the parties, but as against attaching creditors and the corporation itself. Conflicting decisions in different states are in many cases to be accounted for by dissimilar statutes with reference to which these decisions were made; though it is true that the decisions upon transfers of stock and their effect can not always be reconciled in this way. Similar provisions are not always construed in the same way. It is necessary, therefore, in order to determine the validity and effect of transfers of stock in the different states, to examine the statutes as well as the decisions of these states. For this reason the statutes relating to transfers of stock which have been enacted in several states, and the judicial interpretation of these statutes are stated in detail for the several states.

§ 181. **Alabama.**[1]—When, by the charter, articles of association, or by-laws and regulations of a private corporation, the transfer of the stock is required to be made upon the book or books of such corporation, no transfer of stocks shall be valid as against *bona fide* creditors or subsequent purchasers without notice, except from the time that such transfer shall have been registered or made upon the book or books of such corporation. It is the duty of every private corporation to require the transfer of its stock to be made or registered on the books of the corporation; and persons holding stocks not so transferred or registered, or holding any stock under hypothecation, mortgage, or other lien, must have the transfer, hypothecation, mortgage, or other lien, made or registered on the books of the corporation, or upon failing to do so within fifteen days, all such transfers, hypothecations, mortgages, or other liens, shall

[1] Code 1896, §§ 1262, 1263.

be void as to *bona fide* creditors, or subsequent purchasers without notice.

In this state it is held that the by-laws of a corporation requiring transfers of stock to be entered upon its books in the presence of its president or secretary, and declaring a lien in favor of the corporation for all debts of the stockholder to it, are intended for the protection of the corporation, and of third persons who may in good faith acquire its stock; but, while the legal title to stock can only be acquired by a transfer made in the mode prescribed, a complete equitable title may be acquired by a transfer in any form or manner appropriate to pass property of this kind, divesting the stockholder of all right and interest, and entitling the transferree to demand that he be invested with the legal title. The statute makes unregistered transfers void as against *bona fide* creditors and purchasers without notice.[1]

§ 181a. **Arizona.**[2]—Transfer of the stock shall not be valid, except as between the parties thereto, until the same are regularly entered upon the books of the company so as to show the names of the person by whom and to whom the transfer is made, the numbers or other designation of the shares, and the date of the transfer.

§ 182. **Arkansas.**—Stock shall be deemed personal property, and shall be transferred only on the books of the corporation, in such form as the directors shall prescribe; and the corporation shall at all times have a lien upon all the stock or prop-

[1] Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585; Duke v. Cahawba Co. Nav. Co., 10 Ala. 82, 44 Am. Dec. 472; Abels v. Planters' & M. Ins. Co., 92 Ala. 382, 9 So. Rep. 423. Actual notice of an unregistered transfer is binding and protects the transferee. Birmingham Trust & Sav.Co.v. Louisiana Nat. Bank, 99 Ala. 379, 13 So. Rep. 112. The person in whose name the stock is registered is the true owner in the estimation of the statutes, and it is subject to execution against him. White v. Rankin, 90 Ala. 541, 8 So. Rep. 118; Winter v. Montgomery G. L. Co., 89 Ala. 544, 7 So. Rep. 773; Berney Nat. Bank v. Pinckard, 87 Ala. 577, 6 So. Rep. 364; Hardaway v. Semmes, 38 Ala. 657; Fisher v. Jones, 82 Ala. 117, 3 So. Rep. 13.

[2] R. S. 1887, § 242.

erty of its members invested therein, for all debts due from them to the corporation.[1]

This section has not been passed upon by the Supreme Court of the state, but was interpreted by the Circuit Court of Appeals of the United States in a recent decision; in which it was held that a provision that stock shall be transferable only on the books of the corporation, is intended to prescribe a mode of transfer as between the corporation and a stockholder, in all matters relating to the internal government and management of the corporation, rather than between the stockholder and third parties; and, notwithstanding such provision, a stockholder may divest himself of all beneficial interest in his stock by an assignment and delivery of his certificate, although no transfer is made on the books of the corporation.

Where a stockholder in a corporation has pledged his stock as collateral security, by an indorsement and delivery of his certificate, a creditor, by the levy of an attachment and execution, can only reach the interest of the pledgor therein, and is not aided, except in favor of purchasers at a sale under execution who purchase for value and without notice, by a statute providing that stock shall be transferred only on the books of the company.[2]

§ 183. **California.**[3]—Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid, except between the parties thereto, until the same is so entered upon the books of

[1] Dig. of Stats. 1894, § 1342.

[2] Masury v. Arkansas Nat. Bank, 93 Fed. Rep. 603, 35 C. C. A. 476.

[3] Civil Code, § 324. This provision is substantially a re-enactment of the provisions of the Corporation Acts of 1850 and 1853, regulating the transfer of shares of private corporations. Winter v. Belmont Mining Co., 53 Cal. 428, 431, per Crockett, J.

A mortgage of shares of stock is valid without a transfer on the books of the company, as is required by Act of 1853, relative to pledges of stock by delivery of certificates. Ede v. Johnson, 15 Cal. 53.

the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer.

The courts construing this provision have held that although stock may be attached as the property of the registered owner, after the certificate has been pledged by him, yet if the purchaser at the execution sale buys with notice of the prior hypothecation, he acquires no rights as against the pledgee; if, on the other hand, the purchaser has no notice of the prior hypothecation, his title will prevail against the pledgee.[1] The provisions of the statute, in the language of the court, apply only to transfers and purchases in good faith without notice. The result is that while an assignment of shares of stock by a mere delivery of the certificate without a transfer upon the books of the corporation is invalid as against an attaching creditor of the registered owner, yet the rights of the latter may be defeated by giving him notice of such prior transfer of the certificate after his lien has attached, or by giving bidders at the sale such notice. This illogical construction, though not fully approved by later cases, has been acquiesced in upon the principle of *stare decisis*.[2] As against all the

[1] Weston v. Bear River & Auburn Water & Mining Co., 5 Cal. 186, 6 Cal. 425, 63 Am. Dec. 117; Strout v. Natoma Water and Mining Co., 9 Cal. 78.

[2] Naglee v. Pacific Wharf Co., 20 Cal. 529, 533; People v. Elmore, 35 Cal. 653; Winter v. Belmont Mining Co., 53 Cal. 428, 432; Brewster v. Sime, 42 Cal. 139; Thompson v. Toland, 48 Cal. 99, 112; Farmers' Nat. Bank v. Wilson, 58 Cal. 600; Brown v. San Francisco Gas-Light Co., 58 Cal. 426; Barstow v. Savage M. Co., 64 Cal. 388, 1 Pac. Rep. 349, 49 Am. Rep. 705; Blakeman v. Puget Sound Tran. Co., 72 Cal. 321, 13 Pac. Rep. 872; Spreckels v. Nevada Bank, 113 Cal. 272, 276, 45 Pac. Rep. 329.

In Winter v. Belmont Mining Co., 53 Cal. 428, 432, Crockett, J., said: "In the case of Sherwood v. Meadow Valley Mining Co., 50 Cal. 412, our attention was not called to the foregoing decisions, nor to the statute regulating the transfer of stocks in private corporations. Without referring to these decisions or to the statute on which they were founded, counsel in the Sherwood case discussed the sole proposition whether a certificate of this character, on general principles of commercial law, was negotiable in the sense in which bills of exchange and other similar instruments are negotiable, and we held they were not, which was the only point decided in that case."

world, except subsequent purchasers for value in good faith and attaching creditors without notice, a transfer not entered upon the books is valid.[1]

Under this provision a transfer of stock upon the books of the corporation is not essential to the creation of a valid pledge of the stock; but the pledgee has the right to cause a proper entry of the transaction between himself and his pledgor to be entered upon the books of the corporation for his protection, though he is not authorized to divest the pledgor of the rights incident to his ownership of the pledge, by surrender and cancellation of the pledged certificate, and the issuance of a new certificate in the name of the pledgee.[2]

§ 184. **Colorado.**[3]—Corporations other than railroad and telegraph companies are required to keep a book containing the names of stockholders and the number of shares held by them, open for the inspection of the stockholders and creditors of the company; and no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company, unless it shall have been entered upon such book, within sixty days from the date of such transfer, by an entry showing to and from whom transferred; or, in case of the pledge of any such stock, a memorandum be made upon the books of the said company, showing to whom and for what amount the stock has been pledged.

This statute takes from the owner of stock the right to transfer it in accordance with the known rules of the common law. Under it the title to stock in a corporation can only pass against creditors by transfer on the books of the company.[4]

[1] Parrott v. Byers, 40 Cal. 614; Spreckels v. Nevada Bank, 113 Cal. 272, 45 Pac. Rep. 329; McFall v. Buckeye Grangers' Warehouse Asso., 122 Cal. 468, 55 Pac. Rep. 253.

[2] Spreckels v. Nevada Bank, 113 Cal. 272, 45 Pac. Rep. 329; McFall v. Buckeye Grangers' Warehouse Asso., 122 Cal. 468, 55 Pac. Rep. 253.

[3] 3 Mills Annot. Stat. 1896, § 508; Session Laws 1893, c. 49.

[4] Conway v. John, 14 Colo. 30, 23 Pac. Rep. 170; Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691.

§ 185. **Connecticut.**[1]—When not otherwise provided in its charter, the stock of every corporation shall be personal property, and be transferred only on its books, in such form as the directors shall prescribe; and such corporation shall at all times have a lien upon all the stock owned by any person therein, for all debts due to it from him; and any corporation desiring to enforce such lien may give notice to such stockholder, his executor or administrator, and if there be none, his heir at law, that unless he shall pay his indebtedness to said corporation within three months it will sell said stock; and such corporation may prescribe by its by-laws the manner of giving notice required by this section, but the notice of sale shall in no case be given until the liability has become fixed.

Shares of stock in any corporation organized in this state under the laws of this state, or of the United States, may be pledged by executing and delivering a power of attorney for its transfer, with the certificate of stock therein mentioned, to the party to whom the pledge is made; but no such pledge, unless consummated by an actual transfer of the stock to the name of such party, shall be effectual to hold such stock against any person but the pledgor, and his executors and administrators, until a copy of said power of attorney shall be filed with the cashier, treasurer or secretary of said corporation.

A pledge of stock is ineffectual where a certificate is merely handed over without a power to transfer the stock, although there be a written declaration attached to the certificate, that the stock was thereby pledged for a debt described.[2]

Before the passage of this statute it was held in actions at law that the legal title to stock in a corporation could be transferred only in the mode prescribed by the company's charter or by its by-laws; and if the stock was made transferable only on the books of the corporation, a transfer upon the books was essential, not merely as giving notice, but as the act itself

[1] Pub. Acts, 1899, c. 50; G. S. 1888, § 1924. See First Nat. Bank v. Hartford Life & Annuity Ins. Co., 45 Conn. 22.

[2] Platt v. Hawkins, 43 Conn. 139; and see Dutton v. Conn. Bank, 13 Conn. 493; Shipman v. Ætna Ins. Co., 29 Conn. 245.

which changes the title;[1] so that even an entry by the clerk of the corporation upon the deed of assignment that it has been received for record was not sufficient to protect the stock from attachment as the property of the assignor.[2]

But in equity the construction of this rule at law was somewhat modified. If a good reason for failure of an assignee of stock to procure a transfer on the books of a corporation could be shown, and he had done all that it was possible for him to do by giving notice of the assignment to the corporation, he was protected against subsequent attachments of the stock as the property of the assignor. It was said that the ground upon which stock sold but not legally transferred was open to attachment by the creditors of the vendor, was the same as that upon which personal chattels sold, but retained in the possession of the vendor, are liable to attachment as the property of the latter; and that the same circumstances which would excuse failure to take possession in the one case, would excuse a failure to perfect the transfer in the other. Therefore, where a secretary of a company refused to allow a transfer of shares upon the company's books because the shares were already subject to attachment, and the owner made in good faith a written assignment of the stock, and lodged the instrument with the company, it was held that the title of the vendee was good against later attachments of the stock by the vendor's creditors.[3]

§ 186. **Delaware.**[4]—The shares of stock shall be deemed personal property and transferable on the books of the company in the manner provided by the by-laws; and whenever a transfer of shares shall be made for collateral security, and not

[1] Marlborough Manufacturing Co. v. Smith, 2 Conn. 579; Northrop v. Curtis, 5 Conn. 246; Oxford Turnpike Co. v. Bunnel, 6 Conn. 552; Dutton v. Conn. Bank, 13 Conn. 493, 498; Shipman v. Ætna Ins. Co., 29 Conn. 245.

[2] Northrop v. Newton & Bridgeport Turnpike Co., 3 Conn. 544; Dutton v. Connecticut Bank, 13 Conn. 493.

[3] Colt v. Ives, 31 Conn. 25, 81 Am. Dec. 161.

[4] 21 Laws (1899), c. 273, § 16. See Colbert v. Sutton, 5 Del. Ch. 294; Wilmington & Phila. Turnpike Co. v. Bush, 1 Har. 44.

absolutely, the same shall be so expressed in the entry of the said transfer.

§ 187. **District of Columbia.**[1]—No transfer of stock shall be valid for any purposes whatsoever, except to render the person to whom it shall be transferred liable for the debts of the company, until it shall have been entered, in a book to be kept by the treasurer or secretary thereof, by an entry showing to and from whom transferred.

§ 188. **Florida.**[2]—The stock of every corporation shall be deemed personal estate, and shall be transferable in the manner prescribed in the by-laws or regulations of the company; but no shares shall be transferred until all previous assessments thereon have been fully paid in.

§ 188a. **Georgia.**[3]—Except as against the claims of the corporation, a transfer of stock does not require a transfer on the books of the company.

§ 188b. **Hawaii.**[4]—Whenever the capital stock of any corporation is divided into shares, and the certificates thereof are issued, transfer of the shares may be made by indorsement and delivery of the certificate. The indorsee shall be entitled to a new certificate upon surrendering the old one. And no such transfer shall be valid, except between the parties thereto, until such new certificate shall have been obtained, or the transfer shall have been recorded on the books of the corporation, so as to show the date of the transfer, the parties thereto, their places of abode, and the number and description of the shares transferred.

§ 189. **Idaho.**[5]—Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued,

[1] R. S. 1875, p. 70, § 581; Comp. Stats. 1889, c. 15, § 65.

[2] R. S. 1892, §§ 2130, 2131; State v. Suwannee Co., 21 Fla. 1.

[3] Code 1895, § 1855; Southwestern R. Co. v. Thomason, 40 Ga. 408, 411.

[4] Civ. Laws 1897, § 2016.

[5] R. S. 1887, § 2611.

such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number, designation of the shares, and the date of the transfer.

§ 190. **In Illinois** it was formerly held that a transfer in pledge of certificates of stock in a company, whose by-laws provide that a transfer of stock shall only be made upon the books of the secretary on the presentation of the stock certificate, was not effectual as against a levy of execution by a creditor of the pledgor, made before the pledgee had obtained a transfer to himself upon the company's books. The decision was based upon a requirement of statute, that, in levying upon the shares of a stockholder, the sheriff should leave with the clerk, treasurer, or cashier of the company a copy of the execution; for unless the books of the company determined who is the owner of the stock, this provision would be useless.[1]

The law was changed by an amendment of the statute in 1883, and now a pledge of a certificate of stock indorsed in blank and delivered is valid as between the parties and as against third persons having actual or constructive notice of the transaction, although the transfer of the title to the pledgee is not made on the books of the corporation.[2] Any attachment is subject to an unregistered certificate held in pledge.[3]

§ 190a. **Indiana.**[4]—Although the statutes do not expressly declare that transfers of shares of stock shall be invalid except as between the parties unless recorded in the books of the company, it is held that a delivery of bank stock, by a mere delivery of the certificates of stock in pledge, is insufficient to

[1] People's Bank v. Gridley, 91 Ill. 457, 11 Chicago L. N. 332.

[2] Rice v. Gilbert, 173 Ill. 348, affirming 72 Ill. App. 649.

[3] See § 378a, *infra*.

[4] State v. First Nat. Bank, 89 Ind. 302; Coleman v. Spencer, 5 Blackf. 197.

constitute an effectual assignment of the stock, but that it must be transferred upon the books of the company.

§ 191. **Iowa.**[1]—A transfer of shares is not valid, except as between the parties thereto, until regularly entered on the books of the company, showing the name of the person by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer; but such transfer shall not exempt the person making it from any liability of said corporation created prior thereto. Its books must be so kept as to show the original stockholders, their interests, the amount paid on their shares, and all transfers thereof; which books, or a copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same.

When any shares of stock shall be transferred to any person, firm or corporation as collateral security, such person, firm or corporation may notify in writing the secretary of the corporation whose stock is transferred as aforesaid, and from the time of such notice, and until written notice that said stock shall have ceased to be held as collateral security, said stock so transferred and noticed as aforesaid shall be considered in law as transferred on the books of the corporation which issued said stock, without any actual transfer on the books of such corporation of such stock. In such case, it shall be the duty of the secretary or cashier of the corporation, or of the person or firm to which such stock shall have been transferred as collateral security, at once, upon its ceasing to be so held, to inform the secretary of the corporation issuing such stock of such fact. The secretary of the company whose stock is transferred as collateral shall keep a record showing such notice of transfer as collateral, and notice of discharge as collateral, subject to public inspection. No holder of stock as collateral security shall be liable for assessments on the same.[2]

[1] Code 1897, § 1626.

[2] Code 1897, § 1626. Except as provided above, a transfer of stock is not valid as against the levy of an execution until it is regularly entered upon the books of the company. Moore v.

§ 192. **Kansas.**[1]—The stock of any corporation created under the general corporation law is deemed personal estate, and is transferable only on the books of the corporation, in such manner as the by-laws may prescribe; and no person, at any election, is entitled to vote on any stock, unless the same shall have been standing in the name of the person so claiming to vote, upon the books of the corporation, at least thirty days prior to such election; but no shares shall be transferred until all previous assessments thereon shall be fully paid.

§ 192a. **Kentucky.**[2]—The shares of stock shall be transferred on the books of the corporation in such manner as the by-laws thereof may direct, and every person becoming a stockholder by such transfers shall, in proportion to his shares, succeed to all the rights and liabilities of prior stockholders. Under this provision a transfer of stock is valid, not only between the parties, but as against creditors, although not entered upon the books of the company; the provision of the statute requiring the transfer to be made on the books of the company being for the protection of the corporation and purchasers, and not creditors.[3]

§ 193. **In Louisiana** it is provided by the code that notes, bills of exchange, stocks or obligations or claims on other persons may be pledged by delivery of the notes, bills, certificates of stock, or other evidences of the claims or rights so pledged;[4] and it is accordingly held that shares of stock can not be pledged, unless they be evidenced by certificates, which must be transferred and delivered to the pledgee.[5] It seems that it

Marshalltown Opera House Co., 81 Iowa 45, 46 N. W. Rep. 750; Fort Madison Lumber Co. v. Batavian Bank, 71 Iowa 270, 32 N. W. Rep. 336.

[1] 1 G. S. 1897, c. 66, § 22; Topeka Manufac. Co. v. Hale, 39 Kan. 23, 17 Pac. Rep. 601.

[2] G. S. 1899, § 545.

[3] Thurber v. Crump, 86 Ky. 408, 6 S. W. Rep. 145; American Wire Nail Co. v. Bayless, 91 Ky. 94, 15 S. W. Rep. 10. And see Bank v. McNeil, 10 Bush 54; Kenton Ins. Co. v. Bowman, 84 Ky. 430, 1 S. W. Rep. 717; Kentucky Nat. Bank v. Avery, 30 Am. Law Rev. 234.

[4] Civ. Code, Art. 3158.

[5] Lallande v. Ingram, 19 La. Ann. 364; Friedlander v. Slaughter-house Co., 31 La. Ann. 523; Pitot v. John-

is not essential that a note or bill payable to order be indorsed by the payee, if it be delivered, and the pledge be made by notarial act.[1]

The legal title to stocks in corporations whose charters provide that transfers shall not be valid and effectual until registered upon the books of the corporation, does not pass until such requirement is complied with; but the equitable title passes without such registration.[2] But a sale or pledge of the stock of an incorporated company is complete, even as to third persons, by the delivery to the vendee or pledgee of the certificates of stock, with a power of attorney to transfer it on the books of the company; and it is not necessary to the perfection of the sale or pledge, or to protect the stock from seizure by the vendor's creditors, or from other rights of third persons arising subsequently to the sale or pledge, that notice thereof should be given to the corporation, or that an actual transfer of the stock be made on the books.[3] Even a by-law of a corporation providing that its stock shall not be transferred while the holder is indebted to the corporation does not prevent an effectual pledge by delivery of the certificate.[4]

son, 33 La. Ann. 1286; Factors' & Traders' Ins. Co. v. Dry Dock Co., 31 La. Ann. 149; Smith v. Slaughter-house Co., 30 La. Ann. 1378; Kern v. Day, 45 La. Ann. 71, 12 So. Rep. 6; Blouin v. Hart, 30 La. Ann. 714; Crescent City S. & M. W. Manufacturing Co. v. Deblieux, 40 La. Ann. 155, 3 So. Rep. 726.

[1] Ducasse v. Keyser, 28 La. Ann. 419. The statute law of the state left this matter in doubt. Casey v. La Societe de Credit Mobilier, 2 Woods 77, 83, per Woods, J.

[2] Black v. Zacharie, 3 How. 483.

[3] Blouin v. Hart, 30 La. Ann. 714; Smith v. Slaughter-house Co., 30 La. Ann. 1378; Factors' & Traders' Ins. Co. v. Dry Dock Co., 31 La. Ann. 149; Pitot v. Johnson, 33 La. Ann. 1286; New Orleans Nat. Banking Asso. v. Wiltz, 10 Fed. Rep. 330; Freidlander v Slaughter-house Co., 31 La. Ann. 523; Crescent City S. & M. W. Mfg. Co. v. Deblieux, 40 La. Ann. 155, 3 So. Rep. 726.

[4] Blouin v. Hart, 30 La. Ann. 714; Pitot v. Johnson, 33 La. Ann. 1286; Fenner, J., said: "Practically, it lies within the power of either party to protect himself. The corporation when about to permit a debt to be contracted by a holder of its stock, for which it desires the protection of the clause in its charter, may secure the same by requiring the holder to produce his certificates of stock. The pledgee, when about to advance on the pledge and delivery of the certificates, may apply to the corporation for information as to the indebtedness of the pledgor to it."

§ 194. **Maine.**[1]—The delivery of a certificate of stock of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same, or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title against all parties.

Previous to the statute, a delivery of a certificate of stock, together with an assignment and blank power of attorney from the assignor, did not constitute a transfer effectual against an attachment of the stock made by one who had no notice of the transfer, although notice of the transfer had been given to the bank before the attachment. No transfer of stock secured it from attachment, until it was entered upon the books of the corporation in the manner prescribed by the statute.[2]

§ 195. **Maryland.**[3]—The stock of any corporation shall be deemed personal estate, and shall be transferable as shall be prescribed by the by-laws of the corporation. An execution or attachment levied or laid on corporate stock shall not affect the title of a *bona fide* purchaser or pledgee who holds title by a delivery of the certificate with a power to transfer made prior to the levying of such execution or attachments.[4]

§ 196. **Massachusetts.**[5]—The delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee, for value, together with a written transfer of the same, or a written power of attorney to sell, assign or transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties; but no such transfer shall affect the right of the corporation to pay any dividend due upon the

[1] Laws 1897, c. 293 (former statute); R. S. 1883, c. 46, § 12.

[2] Skowhegan Bank v. Cutler, 49 Me. 315, 52 Me. 509; Agricultural Bank v. Burr, 24 Me. 256; Fiske v. Carr, 20 Me. 301.

[3] 1 Pub. Gen. Laws, p. 301, § 63.

[4] 1 Pub. Gen. Laws, p. 392, § 277; Kerr v. Urie, 86 Md. 72, 37 Atl. Rep. 789; Noble v. Turner, 69 Md. 519, 16 Atl. Rep. 124; Swift v. Smith, 65 Md. 428, 5 Atl. Rep. 534; Baltimore Retort & Fire Brick Co. v. Mali, 65 Md. 93, 3 Atl. Rep. 286; Morton v. Grafflin, 68 Md. 545, 15 Atl. Rep. 298; Bloede Co. v. Bloede, 84 Md. 129, 34 Atl. Rep. 1127.

[5] Acts 1884, c. 229.

stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation, or a new certificate is issued to the person to whom it has been so transferred.

Under this statute a power of attorney signed in blank is a sufficient assignment of a stock certificate. Such a power may be filled up by the person to whom the certificate and power of attorney are delivered.[1] A previous statute,[2] in force from 1881 to 1884, provided that no sale, assignment, or transfer of stock in a corporation shall affect the right of the corporation to pay any dividend due upon the same, or affect the title or rights of an attaching creditor, until it is recorded upon the books of the corporation or a new certificate is issued to the person to whom it has been transferred; but no attachment of such stock as the property of the vendor, made after such sale, assignment, or transfer, shall defeat the title or affect the rights of the vendee, if such record is made or a new certificate issued within ten days after such transfer is made.

Previous to the enactment of this statute of 1881 it had been determined by the supreme court of the state that a sale of stock in a corporation is valid against a subsequent attaching creditor of the seller, although no transfer of stock is made on the books of the corporation, in the absence of an express provision of statute, or of the charter of the corporation, requiring such transfer to be made.[3]

When, however, the charter of a corporation, and not merely its by-laws, provided that its shares should "be transferable only at its banking-house and on its books," it has been held

[1] Andrews v. Worcester, Nashua & Rochester R. Co., 159 Mass. 64, 33 N. E. Rep. 1109; Taft v. Church, 162 Mass. 527, 39 N. E. Rep. 283.

[2] P. S. 1882, c. 105, § 24, and c. 106, § 30; Act of 1881, c. 302, § 1. This statute was in such conflict with business interests that it was superseded by the present statute in 1884. For decisions under the former statutes, see Newell v. Williston, 138 Mass. 240; Boyd v. Rockport Steam Cotton Mills, 7 Gray 406; Rock v. Nichols, 3 Allen 342; Central Nat. Bank v. Williston, 138 Mass. 244.

[3] Boston Music Hall v. Cory, 129 Mass. 435; Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351. See § 160.

that the mode of transfer pointed out by the company's charter was the only mode of passing the legal title to its shares, or of transferring the attachable interest in it.[1] It is to be observed, however, that this decision turns upon the language of the charter of the corporation which in Massachusetts is regarded as a public act. In an earlier case in this state, where the by-laws of a corporation required all transfers of shares to be made on the books of the company by the treasurer, it was held that an assignment by deed, accompanied by a delivery of the shares, was valid without a transfer on the books of the company, not only as between the parties, but as against the creditor of the vendor who attached the shares before any notice of the sale had been given to himself or to the treasurer of the company.[2] And in a recent case in this state this distinction between a requirement of the charter and a requirement of the by-laws of a corporation is adopted; and it was held that a pledge of its stock by delivery of the certificate

[1] Fisher v. Essex Bank, 5 Gray (Mass.) 373.

One of the questions discussed in this case was what effects a change of legal title,—whether it occurs when the instrument of transfer is received for record by the clerk of the corporation, which seems to have been the view taken in Brown v. Adams, 5 Biss. 181, or whether this occurs only when an assignment has actually been made upon the company's books. Chief Justice Shaw, upon this point, said: "I do not stop to ask precisely what particular act would constitute such a transfer,—whether it must be actually entered on the books, or whether the delivery of the certificate by the holder ready to transfer, or with a written transfer executed, so that nothing remains but the mere executive act of the clerk, is sufficient. In either case, it would show who is at any time the actual owner by the books, and inform a creditor, or other person having occasion to know or the right to inquire. It is necessary to fix some act, and some point of time at which the property changes and vests in the vendee; and it will tend to the security of all parties concerned to make that turning-point consist in an act which, whilst it may be easily proved, does at the same time give notoriety to the transfer. It would seem to us to be going beyond the rules of just exposition to hold that a plain provision of statute laws, calculated to promote the security of important legal right of parties in important particulars, should be construed to be a regulation made for the convenience and protection of banks."

[2] Sargent v. Essex R. Co., 9 Pick. (Mass.) 202, 305; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

with a power of attorney authorizing the pledgee to transfer it, was good as against the pledgor's assignee in bankruptcy, although the by-laws of the corporation provided that its stock should be assignable only on its books.[1]

§ 197. **Michigan.**[2]—Whenever the capital stock of any corporation is divided into shares, and certificates thereof are issued, such shares may be transferred by indorsement and delivery of the certificates thereof, such indorsement being by the signature of the proprietor, or his attorney, or legal representative; but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered on the books of the corporation as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer.

This provision is declared to be for the protection of parties having equities. It is accordingly held that a judgment creditor buying at an execution sale with knowledge of a prior transfer of the stock by the debtor, whether such transfer be recorded or not, obtains no better title than his debtor had. A transfer by indorsement and delivery is valid. The entry upon the company's books is necessary only for the benefit and security of the company and not to the validity of the holder's title. Such transfer is valid against creditors of the registered holder of the stock, if, before sale by the sheriff upon execution, the purchaser at such sale has notice of the unregistered transfer.[3]

§ 198. **Minnesota.**[4]—The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered

[1] Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351. See, also, Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515.

[2] Compiled Laws 1897, § 8533; Howell's Annotated Stats. 1882, c 191, § 7.

[3] Newbury v. Detroit & Lake Superior Iron Co., 17 Mich. 141; Walker v. Detroit Transit R. Co., 47 Mich. 338, 11 N. W. Rep. 187; Mandlebaum v. North American Mining Co., 4 Mich. 465. See Lyon v. Denison, 80 Mich. 371, 379, 45 N. W. Rep. 358; McLean v. Charles Wright Medicine Co., 96 Mich. 479, 56 N. W. Rep. 68; May v. Cleland, 117 Mich. 45, 75 N. W. Rep. 129, 44 L. R. A. 163.

[4] G. S. 1894, §§ 2599, 2799.

on the books of the company, so far as to show the names of the persons by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer; but such transfer shall not in any way exempt the person making such transfer from any liabilities of said corporation which were created prior to such transfer. The books of the company shall be so kept as to show intelligibly the original stockholders, their respective interests, the amount which has been paid in on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same.

The stock of a corporation shall be deemed personal property, and shall be transferable only on the books of such corporation, in such form as the directors may prescribe.

A statutory provision that stock of a corporation shall be transferable only on the books of the corporation, in such form as the directors may prescribe, is held to be intended solely for the protection and benefit of the corporation. It does not incapacitate a shareholder from transferring his stock, in pledge or otherwise, without any entry upon the corporation books. Except as against the corporation, the owner and holder of shares of stock may, as an incident of his right of property, transfer them in the same way that he may transfer any other personal property of which he is owner.[1] A transfer not entered upon the books of the corporation takes precedence of a subsequent attachment by a creditor of the holder of record.[2]

§ 199. **Mississippi.**[3]—Stock in all corporations is transferable by the indorsement and delivery of the stock certificate, and the registry of such transfer in the books of the company.

[1] Baldwin v. Canfield, 26 Minn. 43, 1 N. W. Rep. 261.

[2] Lund v. Wheaton Roller Mill Co., 50 Minn. 36, 52 N. W. Rep. 268; Nolan v. Hazen, 44 Minn. 478, 47 N. W. Rep. 155; Joslyn v. St. Paul Distilling Co., 44 Minn. 183, 46 N. W. Rep. 337.

[3] Annotated Code 1892, 844; Laws 1894, c. 55.

Under this statute it is held that an equitable transferee by transfer of the certificate without an entry upon the books is preferred to an attaching creditor.[1]

§ 200. **In Missouri**[2] it is provided by statute that the stock of every company formed under the general corporation act shall be deemed personal estate, and shall be transferable in the manner prescribed by the by-laws of the company; but no shares shall be transferred until all previous calls thereon shall have been fully paid in.

It is held that inasmuch as the statute does not restrict the transfer of stock to a particular mode, a transfer by delivery of a certificate with a power to transfer, is sufficient, not only as between the parties themselves, but also as against creditors of the assignor who have seized the shares after such transfer, and before the transfer has been entered upon the books of the corporation.[3]

§ 201. **Montana.**[4]—Wherever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the owner, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid, except as between the parties thereto, until the same is so entered upon the books of the company as to show the names of the parties by and to whom transferred, the numbers and designation of the shares, and the date of the transfer.

Certificates of stock to bearer may be issued by corporations organized in whole or in part for mining purposes with capital stock non-assessable and full paid. These may be converted

[1] Clark v. German Security Bank, 61 Miss. 611; Goyer Cold Storage Co. v. Wildberger, 71 Miss. 438, 15 So. Rep. 235.

[2] R. S. 1899, § 965.

[3] McClintock v. Central Bank, 120 Mo. 127, 24 S. W. Rep. 1052; Merchants' Nat. Bank v. Richards, 74 Mo. 77, affirming 6 Mo. App. 454; Simmons v. Hill, 96 Mo. 679, 10 S. W. Rep. 61.

[4] Codes 1895; II Civ. Code, § 472.

into registered certificates upon the surrender of the bearer's certificate.[1]

§ 202. New Hampshire.[2]—Shares of stock may be transferred by the proprietor by a writing upon the back of the certificate by him signed, or by a deed under seal, and the purchaser, upon producing and surrendering the former certificate so transferred or the certificate accompanied by such deed, shall be entitled to a new certificate if no liens upon the stock against the former proprietor have attached.

The delivery of a stock certificate to a *bona fide* purchaser or pledgee for value, together with a written transfer or a deed of the same, or a power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties except the corporation, but no such transfer shall affect the right of the corporation to treat the stockholder of record as the stockholder in fact, until the old certificate is surrendered and a new certificate is issued to the person entitled thereto.

No corporation shall make any by-law to restrain the free sale of shares of its stock; every such by-law shall be void.

No person holding stock as executor, administrator, guardian, or trustee, and no person holding stock as collateral security, shall be thereby personally subject to any liabilities as a stockholder; but the person pledging such stock shall be so liable; and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be liable to the same extent as a holder thereof in his own right would be liable.[3]

In this state it was formerly held that a transfer upon the books of the corporation is requisite to make a pledge of stock effectual against creditors of the pledgor, although there be nothing either in the charter or by-laws of the corporation prescribing or regulating the mode of making a transfer.[4]

[1] Laws 1897, p. 69.

[2] Pub. Stats. 1901, c. 149, §§ 13, 14, 15.

[3] P. S. 1891, c. 150, § 20.

[4] Pinkerton v. Manchester & Lawrence R. Co., 42 N. H. 424, 1 Am. L.

A transfer agent is sometimes appointed to act at a distance from the office of the corporation in which its records are kept. He may have authority to receive old certificates and issue new ones; but the transfer is not ordinarily complete till he has sent proper evidence of it to the keeper of the stock record at the home office of the corporation. If such evidence be transmitted by the earliest mail, it would seem that the transfer would be effectual though an attachment had intervened. But if a creditor taking stock as collateral security do not use due diligence in obtaining a proper transfer of the stock, an intervening attachment will take precedence.[1] "It seems too clear for argument," say the supreme court,[2] "that the ownership of the shares passes from the seller to the buyer by force of the contract of sale, and not by operation of law; and if that be so, the buyer's title, so far as the seller is concerned, attaches the moment this contract is fully consummated between them. This kind of property, being an intangible right, somewhat akin to the right to receive money due upon a bond or other chose in action, is incapable of actual manual delivery. All the seller can do, that corresponds at all to the delivery of personal chattels in other cases of sale, is, to hand over to the

Reg. (N. S.) 96, and note by Redfield. The certificates issued by the corporation were expressed to be transferable by assignment on the books of the corporation. "We are aware," say the court rendering this decision, "that choses in action may be transferred by a simple delivery of the evidence of indebtedness, with an indorsement thereon, in certain cases; but it will be observed that, in these cases, all such changes in the indications of ownership, as the nature of the case will admit, are required. If, therefore, upon the transfer of a bond or bill of exchange it be retained by the assignor, a subsequent purchaser without notice would acquire a good title. Indeed, it may be laid down as a general principle governing the transfer of every species of personal property, that, to be good against innocent third persons, such transfer must be accompanied with such change of possession and indications of ownership as the nature of the thing is capable of; otherwise, the seller is enabled, by means of an apparent ownership, to obtain a fictitious credit, and to deceive both creditors and purchasers." See, also, Scripture v. Soapstone Co., 50 N. H. 571; Buttrick v. Nashua & L. R. Co., 62 N. H. 413; Meredith Village Sav. Bank v. Marshall, 68 N. H. 417, 44 Atl. Rep. 526.

[1] Pinkerton v. Manchester & Lawrence R. Co., 42 N. H. 424.

[2] Scripture v. Soapstone Co., 50 N. H. 571.

buyer his certificate, with a sufficient asssignment by deed or otherwise to entitle him to a transfer of the shares on the books of the company. When the seller has done this, his power and duty in the matter are ended, and it is the option of the purchaser whether the transfer shall be recorded or not. If the purchaser omits to have this record made, he can claim no rights as a member of the corporation; and he also incurs the further risk of having his title defeated by a subsequent attachment or sale to a *bona fide* purchaser."

§ 203. **Nevada.**[1]—Whenever the capital stock of any corporation is divided into shares, and certificates thereof are issued, the stock of the company shall be deemed personal estate. Such shares may be transferred by indorsement and delivery of the certificate thereof, such indorsement being by the signature of the proprietor, or his or her attorney or legal representative; but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered upon the books of the coporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer. In all cases in which shares of stock in corporations now existing, or hereafter incorporated under any law of this state, are held or owned by a married woman, such shares may be transferred by her, her agent or attorney, without the signature of her husband, in the same manner as if such married woman were a *feme sole*. All dividends payable upon any shares of stock of a corporation held by a married woman, may be paid to such married woman, her agent or attorney, in the same manner as if she were unmarried. And it shall not be necessary for her husband to join in receipt therefor; and any proxy or power given by a married woman, touching any share of stock of any corporation owned by her shall be valid and be binding, without the signature of her husband, the same as if she were unmarried.

[1] Comp. Laws 1900, §§ 874, 875; State v. Pettineli, 10 Nev. 141; Bercich v. Marye, 9 Nev. 312.

Any stockholder may pledge his stock, by a delivery of the certificates, or other evidence of his interest, but may nevertheless represent the same at all meetings and vote as a stockholder.

§ 204. **New Jersey.**[1]—The shares of stock in every corporation of this state shall be deemed personal property, and shall be transferable on the books of such company in such manner as the by-laws may provide; and whenever any transfer of shares shall be made for collateral security, and not absolutely, the same shall be so expressed in the entry of said transfer.

In this state it is held that shares in a corporation, whose charter provides that the capital stock of the company shall be deemed personal estate, and "be transferable upon the books of the corporation," can be effectually transferred as collateral security for a debt, as against a creditor of the pledgor, who afterwards attaches them without notice of any transfer, by a delivery of a certificate with a blank power of attorney, or with an assignment in blank.[2] Upon the policy of so construing this provision, Chancellor Green, of New Jersey, says:[3] "The pledge of stocks as collateral security has become a prevalent, and, to the borrower especially, an advantageous mode of effecting loans. In manufacturing companies especially, where the business of the company is carried on by the stockholder, and where his capital is mainly or exclusively vested in the stock and employed in the active operations of business, the pledge of stocks affords the most ready and advantageous mode of effecting loans for the demands of business. To require a transfer of the stock to the lender as security for the loan, against the right of attaching or execution creditors, will at once destroy the value of the security, or compel the borrower to divest himself of his character as corporator, to

[1] 1 G. S. 1895, p. 913, § 26.

[2] Broadway Bank v. McElrath, 13 N. J. Eq. 24; Hunterdon Co. Bank v. Nassau Bank, 17 N. J. Eq. 496; Mount Holly L. & M. T. Co. v. Ferree, 17 N. J. Eq. 117; Rogers v. New Jersey Ins. Co., 8 N. J. Eq. 167.

[3] Broadway Bank v. McElrath, 13 N. J. Eq. 24.

forfeit his control of the business of the corporation, of his right to dividends, and of all his other rights as a stockholder in the corporation. Why should the owner of stocks be deprived of the privilege of mortgaging or pledging his stock for the security of a loan, without stripping himself of all his rights of ownership, more than the owner of any other property?"

§ 205. **New Mexico.**[1]—The stock of the company shall be deemed personal estate and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid, except between the parties thereto, until the same shall be so entered on the books of the company as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer.

Any stockholder may pledge his stock by a delivery of the certificates or other evidence of his interest, but may nevertheless represent the same at all meetings, and vote accordingly as a stockholder.

§ 206. **In New York** it is held that a provision in a certificate of stock, though in accordance with the by-laws of the corporation, that the shares are transferable only upon the books of the company, means that the company will not recognize any one as owner of the stock, unless it be so transferred; but that it does not affect the rights which another person may acquire as against the stockholder, by the delivery of the certificate in pledge.[2] A transfer by delivery of the certificate

[1] Comp. Laws 1884, §§ 200, 203. See Lyndonville Nat. Bank v. Folsom, 7 N. M. 611, 38 Pac. Rep. 253.

[2] McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Smith v. Am. Coal Co., 7 Lans. 317; New York & New Haven R. Co. v. Schuyler, 34 N. Y. 30; Bank of Utica v. Smalley, 2 Cow. 770, 14 Am. Dec. 526; Commercial Bank v. Kortright, 22 Wend. 348, 20 Cow. 91; Holbrook v. N. J. Zinc Co., 57 N. Y. 516, 623; Weaver v. Barden, 49 N. Y. 286; Grymes v. Hone, 49 N. Y. 17; Leitch v. Wells, 48 N. Y. 585, 587, 606; Hill v. Newichawanick Co., 48 How. Pr. 427; Driscoll v. West, etc., Manufacturing Co., 36 N. Y. Superior Ct. 488; De Comeau Guild Farm Oil Co., 3 Daly 218; Cutting v. Damerel, 88 N. Y. 410; Rob-

is nevertheless valid against an attaching creditor of the pledgor, when the attachment is made after such transfer, but before there has been any transfer made on the books of the company.[1]

"It has also been settled, by repeated adjudications, that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at his pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title of the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections.'"[2]

§ 207. **North Carolina.**[3]—Certificates of stock shall be assign-

inson v. National Bank, 95 N. Y. 637.

Under a contract to deliver stock, a tender of a certificate with a blank power to transfer is sufficient without an actual transfer to the name of the purchaser. Orr v. Bigelow, 20 Barb. (N. Y.) 21; Munn v. Barnum, 24 Barb. (N. Y.) 283; Driscoll v. West, etc., Manufacturing Co., 36 N. Y. Superior Ct. 488, 59 N. Y. 96.

[1] Smith v. Am. Coal Co., 7 Lans. 317; De Comeau v. Guild Farm Oil Co., 3 Daly 218.

By § 647 of Code of Civil Procedure 1880, and § 234 of the previous Code, it is provided that the rights or shares which a defendant may have in the stock of any corporation shall be liable to be attached and levied upon, and sold to satisfy the judgment and execution. "But this provision of law can not aid an attachment against a defendant who has no rights or shares in the stock of a corporation. If, previous to the issuing of the attachment, the defendant has assigned all his interest in the rights or shares, and delivered over the certificate with transfer and power, it is thenceforth the holder of these *indicia* of title who is possessed of the property in the shares, and not the original stockholder." Smith v. American Coal Co., 7 Lans. 317.

[2] McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 331, 7 Am. Rep. 341, per Rapallo, J.

[3] Battle's Revisal 1873, c. 26, § 16. See Morehead v. Western N. C. R. Co., 96 N. C. 362, 2 S. E. Rep. 247.

able by the indorsement of the owner, or by some writing attached thereto; but no assignment of the stock of any company by the registered plan of incorporation, of which the individual stockholders are liable for the contracts of the company, shall be valid to exonerate the assignor from such liability upon contracts made after such assignment, until such assignment shall have been entered on the stock book of the company; nor shall any company be bound to notice of such assignment until the same, authenticated as may be required by the by-laws, shall be presented to the proper officer for entry on such book.

§ 207a. **North Dakota.**[1]—Whenever the capital stock of any corporation is divided into shares, and certificates thereof are issued, such shares of stock are personal property and may be transferred by indorsement by the signature of the proprietor or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares and the date of the transfer.

§ 208. **Ohio.**[2]—It is provided by statute that shares of stock in any company shall be personal property, and when fully paid up shall be subject to levy and sale upon execution against the owner.

It seems that a pledge by delivery of the certificate is effectual, though the certificate, in accordance with a by-law and with the articles of association of the corporation, is expressly made "transferable only on the books of the bank, in person or by attorney."[3]

The interest of a stockholder in the property of a private corporation represented by certificates of shares registered in his

[1] R. Code 1895; Civ. Code, § 2876.

[2] 2 Bates Annot. Stat. 1899, § 3255; R. S. 1880, § 3255.

[3] Lee v. Citizens' Nat. Bank, 2 Superior Ct. 298.

name, may be reached by garnishee process served upon the corporation. Where, prior to the service of such process, the shareholder has pledged the certificates as security for a debt, and has delivered them to the pledgee, with an absolute power of sale and transfer upon the books of the corporation, indorsed thereon, upon default of payment of the debt thereby secured, the attachment reaches only the surplus after payment of the debt to the pledgee. If, after this interest in the corporation has been thus attached, the pledgee does not exercise the power of sale and transfer vested in him, and the stock remains in the name of the pledgor on the books of the corporation, the court may, proper parties being before it, order the sale of the stock, ascertain such surplus and order its application to the satisfaction of the judgment in attachment. Such an attachment has precedence over a later one when it is sought to reach this surplus, by garnishee process served upon the pledgee, who has never exercised the power of sale and transfer.[1]

§ 208a. **Oklahoma.**[2]—Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer.

§ 209. **Pennsylvania.**[3]—Certificates or evidences of stock of a corporation shall be transferable at the pleasure of the holder

[1] Norton v. Norton, 43 Ohio St. 509, 3 N. E. Rep. 348.

[2] Comp. Stats. 1893, § 945.

[3] Brightly's Purdon's Ann. Dig., p. 1844, § 19; Brightly's Purdon's Ann. Dig. 1894, p. 417, § 66.

For a statute making stock of a bank assignable only on the books of the corporation, in such manner as its by-laws shall ordain, and providing that no transfer shall be made by a stockholder indebted to the bank, see Act April 10, 1850, § 10, art. 10.

in person, or by attorney duly authorized, as the by-laws may prescribe, subject, however, to all payments due, or to become due thereon; and the assignee or party to whom the same shall have been so transferred, shall be a member of said corporation, and have and enjoy all the immunities, privileges and franchises, and be subject to all the liabilities, conditions and penalties incident thereto, in the same manner as the original subscriber or holder would have been. Upon a sale of such stock in satisfaction of any debt for which it is pledged, the purchaser shall have the right to compel a transfer of such stock upon the corporation books and the delivery of a proper certificate therefor.[1]

A substantial compliance with a by-law requiring a transfer of stock to be made on the books of the company, and attested by the secretary, is all that is necessary. Thus, when a stockholder empowered the secretary of the company to transfer certain shares, and the secretary, in pursuance of such power, entered on the books that the stock was transferred, adding "see paper filed," and wafered the power of attorney to the book and attested the entry of transfer as secretary, the transfer was held to be good, although the secretary signed no transfer as attorney under the power.[2] "The practice was to permit the transfers in the presence of the secretary, who attested them. Everything was done which the by-laws and usage of the company required, except that he did not sign the transfer twice over, as attorney, and then attest his own signature as secretary. But he no doubt thought that attaching the sign manual of the holder, appended to the authority or power, to the books and entry, was higher evidence of the transfer than his own signature would be. The law looks more to the substance of things than to the mere form."

In this state an attachment of stock is made in the manner of a proceeding against a trustee or garnishee in a foreign attachment, and it is held that an assignment of stock by deliv-

[1] 3 Pepper and Lewis Dig. 1897, p. 178, § 7.

[2] Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120, 125.

ery of the certificate with a power to transfer, conveys the real ownership of the stock, so that an attachment afterwards made of the stock, as the property of the assignor, before a transfer is made upon the books of the corporation, is ineffectual.[1] The assignee in such case is the equitable owner, or the real owner, and must be treated as such when known, by all the world, excepting the corporation itself, which, for certain purposes, may refuse to do so. The effect of such an assignment of stock is the same as that of an assignment of a chose in action prior to the service of a trustee or garnishee process upon the supposed trustee; although the trustee may then have had no notice of the assignment, this will prevail against the subsequent attachment.

In one case it appeared that the Duchess of Cumberland bought at London, in 1794, ten shares of the Bank of the United States, and received therefor a certificate with a blank power to transfer.[2] She held the certificate and power until 1804. In 1803 the United States attached the stock, which still stood in the seller's name, for a debt due from him. It was proved, under objection, that it had been the course of business in relation to the sale of this stock in England, for the vendor to deliver the certificates to the vendee, together with a power of attorney from him in whose name the stock stood, to a third person, usually an assistant cashier of the bank, authorizing him to transfer the same to some person not named, and that by the delivery of the certificate and the blank

[1] Finney's Appeal, 59 Pa. St. 398; Eby v. Guest, 94 Pa. St. 160; Telford & F. Turnpike Co. v. Gerhab (Pa.), 13 Atl. Rep. 90; Commonwealth v. Watmough, 6 Whart. (Pa.) 117; United States v. Vaughan, 3 Binn. (Pa.) 394. In the latter case Yeates, J., said: "It can not be denied that a mere chose in action, equitably assigned, is not subject to the operation of a foreign attachment instituted against the party, whose name must necessarily be used at law for the recovery of the demand; and that an attaching creditor can stand on no better footing than his debtor."

And see Early & Lane's App., 89 Pa. St. 411; Bank of Commerce's App., 73 Pa. St. 59.

[2] An assignment of the stock of a corporation to itself, as collateral security for a loan, divests the title of the assignor so far as to prevent a sale of it under a *fieri facias* against him. Eby v. Guest, 94 Pa. St. 160.

power of attorney, the shares passed from hand to hand, the blank never being filled up until it was forwarded to the United States for transfer. It was held that the purchaser's title was superior to that of the attaching creditor.[1]

§ 210. **Rhode Island.**[2]—The shares into which the capital stock of any corporation shall be divided shall be deemed to be personal estate, unless otherwise provided in the act creating the corporation, and shall be transferable in such manner as shall be prescribed by the by-laws of the corporation.

The delivery of a certificate of stock of a corporation, transferable only on the books of the corporation on surrender of the certificate, to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same or a written power of attorney to sell, assign, and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title against all parties; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded, or presented for record, upon the books of the corporation, or a new certificate is issued to the person to whom it has been so transferred.[3]

In a recent case in this state[4] it appeared that a person owning certain corporate shares, transferred them on the books of the corporation as collateral for a loan which he had negotiated for. The arrangements for the loan having fallen through, the person in whose name the certificate had been taken out, at the request of the owner of the shares, indorsed and transferred the certificate of stock to a creditor of the owner. Before a transfer was made on the books of the corporation to this creditor, the shares were attached by another creditor. The charter of the corporation contained no provision as to the transfer of stock, but the by-laws provided that "all trans-

[1] United States v. Vaughan, 3 Binn. 394.

[2] G. L. 1896, c. 177, §§ 2, 20.

[3] G. L. 1896, c. 177, § 20.

[4] Beckwith v. Burrough, 13 R. I. 294; Lippitt v. Am. Wood Paper Co., 15 R. I. 141, 23 Atl. Rep. 111.

fers of stock shall be made in the books of the company." On a bill in equity brought to establish the lien of the attachment, it was held that, in the absence of any fraudulent intent on the part of the debtor in the transfer of the stock, the attachment could not be sustained. Chief Justice Durfee, delivering the opinion of the court, said: "Where the legal and the equitable titles unite in the same person, it is well settled that such a transfer carries at least the equitable title, even when, by statute, charter, or by-law, the stock is declared to be transferable only on the corporation books.[1] In the case at bar, however, the legal title was in one person and the equitable in another, and the question is what, in such a case, is the effect of such a transfer. It may be that in such a case the equitable title would not *always* pass; as for instance, if the transfer were made by the legal owner to pay a debt of his without the consent of the equitable owner. But we have no case like that here. Here the transfer was made, not in violation of the trust, but in fulfilment of it. It was made under the direction of the equitable owner to secure or pay *pro tanto* his debt, and when made was delivered by him personally to the transferee. We think the equitable title must be held to have passed. An equitable assignment may be made without deed or writing, by any act intended to operate as such, a delivery of the evidences of title being particularly significant of such an intent. * * * Without deciding, therefore, whether an unrecorded transfer would avail against an attaching creditor where the stock stood in the name of the debtor, we decide, for the reasons above given, that the complainant has not, independently of his charges of fraud, made out a case which entitles him to relief."

§ 211. **South Carolina.**[2]—The shares in the capital stock of

[1] Lockwood v. Mechanics' National Bank, 9 R. I. 308, 331, 11 Am. Rep. 253; Broadway Bank v. McElrath, 13 N. J. Eq. 24; United States v. Vaughan, 3 Binn. 394; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Black v. Zacharie, 3 How. (U. S.) 483; Parrott v. Byers, 40 Cal. 614; Blouin v. Hart, 30 La. Ann. 714; Bank of America v. McNeil, 10 Bush 54.

[2] G. S. 1882, § 1365; R. S. 1893, § 1500, pl. 4.

such corporations shall be deemed personal estate; and the mode of issuing the evidence of stock, and the manner, terms, and conditions of assigning and transferring shares, shall be prescribed by the by-laws of each corporation.

§ 211a. **South Dakota.**[1]—Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer.

§ 212. **Tennessee.**—According to the earlier decisions in this state, the title of one taking certificates of stock as collateral security was not regarded as complete against the owner's creditors until notice of the transfer had been given the corporation. If, before such notice was given, such creditor attached the stock, or levied execution upon it, he had the better right to it.[2] This rule was based upon the English doctrine, that notice is necessary to perfect an assignment of any chose in action;[3] and the policy of the rule, as applied to transfers of stock, was regarded as obvious, because it afforded a ready means of ascertaining the title to stock, and of preventing the setting up of fraudulent claims under secret transfers of certificates. By giving such notice to the company, the assignee acquired an equity superior to the right of a subsequently

[1] Annot. Stats. 1899; Civ. Code, § 3827. The statute relates to transfer of the legal title, and not to an equitable lien. A transfer on the books is not essential to validity of pledge of stock in a corporation. Van Cise v. Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. Rep. 897.

[2] State Ins. Co. v. Sax, 2 Tenn. Ch. 507; Clodfelter v. Cox, 1 Sneed 330, 60 Am. Dec. 157; and see dissenting opinions of McFarland and Cooper, JJ., in Cornick v. Richards, 3 Lea 1.

[3] Judson v. Corcoran, 17 How. 612.

attaching creditor, although there be a valid by-law that stock is transferable only on the books of the company.[1]

But it is now held that an assignment of a certificate of stock with a blank power of attorney to make the transfer upon the books of the corporation passes a complete legal title, and is effectual against the assignor's creditors without any registry upon the books of the corporation, and without notice to it of the assignment.[2]

§ 213. **Texas.**[3]—The stock of any corporation created in this state shall be deemed personal estate, and shall be transferable only on the books of the corporation in such manner as the by-laws may prescribe.

In the absence of a charter or statutory provision requiring a transfer of stock on the books of the company, as between the shareholder and his assignee, to pass title as against a creditor, the interest of the creditor is regarded as subordinate to that of a *bona fide* assignee.[4] The true policy of the law is to favor unrestricted transfers of stock. An assignee or purchaser should not be bound to look beyond the certificate, or to examine the books of the corporation, to ascertain the validity of a transfer, as a different rule would impair the value of stock, and seriously disturb the usages of trade and the established order of business.

§ 214. **Utah.**[5]—The stock shall be deemed personal property, and may be transferred in such manner as may be provided in the agreement or by-laws.

But although the by-laws of a corporation provide for the transfer of stock upon the books of the company, a judgment creditor buying stock which he knows his debtor has pledged

[1] State Ins. Co. v. Gennett, 2 Tenn. Ch. 100.

[2] Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. Rep. 209; State Ins. Co. v. Sax, 2 Tenn. Ch. 507; Cornick v. Richards, 71 Tenn. (3 Lea) 1; Cherry v. Frost, 7 Lea 1, 21 Am. L. Reg. (N. S.) 57. See § 159.

[3] Botts' Annot. R. Civ. Stats. 1895, art. 666.

[4] Strange v. Houston & Tex. Cent. R. Co., 53 Tex. 162; Seeligson v. Brown, 61 Tex. 114.

[5] Compiled Laws 1876, p. 230, § 542.

by a transfer of the certificate by indorsement in blank, acquires no title as against the pledgee.[1]

§ 215. **Vermont.**[2]—The capital stock of all private corporations shall be deemed personal estate, and may be transferred as provided by its by-laws.

It is held in this state that a delivery of a certificate, with a power of transfer, vests the title in the transferee; that the object of having the transfer recorded on the books of the corporation is notice, and only that; and consequently that such a transfer, though unrecorded, is good against the party himself, and all those who have notice of the fact of the transfer. But such a transfer seems to be regarded as ineffectual as against creditors of the assignor. The stock, while standing in the assignor's name, after his transfer by delivery of the certificate, with a power of transfer upon the books of the company, is probably subject to any attachment at the suit of his creditors, if they have no notice in fact of the transfer.[3] "We entertain no reasonable doubt," says Redfield,[4] "that the mode of transfer of stock pointed out in the charter is the only mode which the public are bound to regard as conveying the title. All persons unaffected with notice to the contrary are at liberty to act upon the faith of the title being where it appears upon the books of the corporation to be. This view we do not think inconsistent with the notion that any other mode of conveyance may be perfectly good, between the parties to it, and to all others having notice of it, the same as an unrecorded deed, or notice of a mere equity."

§ 216. **Virginia**[5] **and West Virginia.**[6]—If any person, for valuable consideration, sell, pledge, or otherwise dispose of any shares belonging to him to another, and deliver to him

[1] Barse Live Stock Co. v. Range Val. Cattle Co., 16 Utah 59, 50 Pac. Rep. 630.

[2] G. S. 1894, § 3687.

[3] Noyes v. Spaulding, 27 Vt. 420, 426, per Isham, J.

[4] Sabin v. Bank of Woodstock, 21 Vt. 353, 362; Cheever v. Meyer, 52 Vt. 66.

[5] Code 1887, § 1134.

[6] Code 1891, c. 53, § 37.

the certificate for such shares, with a power of attorney authorizing the transfer of the same on the books of the corporation, the title of the former shall vest in the latter, so far as may be necessary to effect the sale, pledge, or other disposal of the said shares, not only as between the parties themselves, but also as against the creditors of and subsequent purchasers from the former.[1]

§ 217. **Washington.**[2]—The stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid, except between the parties thereto, until the same shall have been entered upon the books of the company, so as to show the names of the parties, by and to whom transferred, the numbers and designation of the shares, and the date of the transfer.

Any stockholder may pledge his stock by a delivery of the certificate or other evidence of his interest, but may, nevertheless, represent the same at all meetings, and vote as a stockholder.

§ 218. **Wisconsin.**[3]—The capital stock of every corporation divided into shares shall be deemed personal property, and when certificates thereof are issued, such shares may be transferred by indorsement of the owner, his attorney or legal representative, and delivery of the certificate. The delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same signed by the owner of the certificate, his attorney or legal representative, shall be sufficient delivery to transfer the title as against all persons; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock or to treat the holder of record as the holder in fact until such

[1] Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. Rep. 646.

[2] Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co., 6 Wash. 597, 34 Pac. Rep. 155; Dearborn v. Washington Sav. Bank, 18 Wash. 8, 50 Pac. Rep. 576; Code 1896, § 2654.

[3] Annot. Stat. 1898, § 1751; Plankinton v. Hildebrand, 89 Wis. 209, 61 N. W. Rep. 839.

transfer is recorded upon the books of the corporation or a new certificate is issued to the person to whom it has been so transferred.

The stock of every such corporation shall be deemed personal estate, and shall be transferable in the manner prescribed in its by-laws, but no shares shall be transferable until all previous calls thereon shall have been fully paid in.

§ 219. **Wyoming.**[1]—The stock of corporations shall be deemed personal property, and shall be transferable in such manner as shall be prescribed by the by-laws of the company.[2]

§ 219a. **The tendency of legislation is now strongly in the direction of making a transfer of the certificate without registration upon the company's books effectual as against creditors** attaching the stock as the property of the person who had assigned his certificate; and the tendency of adjudication is also strongly in the same direction, in case the statute under construction does not in terms make a transfer without registration invalid for any purpose. A summary of the law as it now is in the different states may be found in the accompanying note.[3]

[1] R. S. 1887, § 510.

[2] See Wyoming Fair Asso. v. Talbott, 3 Wyo. 244, 21 Pac. Rep. 700.

[3] In the following named states a registration of a transfer of stock upon the books of the company is essential to protect a pledgee or other transferee against *bona fide* creditors without notice attaching the stock as the property of the person in whose name it stands on the company's books:

Alabama, § 181.
Arizona, § 181a.
Colorado, § 184.
Connecticut, § 185.
Delaware, § 186.
District of Columbia, § 187.
Florida, § 188.
Hawaii, § 188b.
Idaho, § 189.
Indiana, § 190a.
Iowa, § 191. Effectual if notice of it be given to the company.
Kansas, § 192.
Michigan, § 197. Unregistered transfer effectual against execution creditor having notice.
Montana, § 201.
Nevada, § 203.
New Mexico, § 205.
North Carolina, § 207.
North Dakota, § 207a.
Oklahoma, § 208a.
South Carolina, § 211.
South Dakota, § 211a.
Vermont, § 215.

A transfer is valid against creditors, though not entered upon the books in:

Arkansas, § 182.
California, § 183.

§ 220. **Upon a review of the statutes and decisions upon this subject** it appears that the courts have taken a much more liberal view of the policy that should govern in the matter of transfers of shares of stock than have the legislatures of the different states; for it appears that where there has been legislation upon this subject the legislation has generally been for the purpose of restricting transfers of stock by making a registry upon the books of the corporation requisite to the validity of such transfers for any purpose. The courts, on the other hand, have been disposed to allow the utmost freedom in such transfers, when they have not been restricted by public statutes, or by charters having the force of such statutes. The judicial interpretation of the common law rights of the parties respecting such transfers seems to have had in view the convenience of owners of corporate stocks, and that of those who purchase them, or take them as security; while legislation upon this subject has served rather for the protection of the creditors of stockholders. The judicial view of this matter is well stated by the supreme court of Tennessee in a recent case.[1] "We know, as a matter of well accredited current history, that stocks are used every day in the transactions of our business men, as collaterals, as well as sold, and that the universal practice is to transfer or assign the certificate of the stock, with a power of attorney in blank, to be filled up, authorizing a transfer by the corporation on its books to the purchaser, on the presentation of which power, properly authenticated, the corporation transfers the stock to the purchaser or holder, and

Georgia, § 188a.
Illinois, §§ 190, 378a.
Kentucky, § 192a.
Louisiana, § 193.
Maine, § 194.
Maryland, § 195.
Massachusetts, § 196.
Minnesota, § 198.
Mississippi, § 199.
Missouri, § 200.
New Hampshire, § 202.
New Jersey, § 204.
New York, § 206.
Ohio, § 208.
Pennsylvania, § 209.
Rhode Island, § 210.
Tennessee, § 212.
Texas, § 213.
Utah, § 214.
Virginia, § 216.
Washington, § 217.
West Virginia, § 216.
Wisconsin, § 218.
Wyoming, § 392a.

[1] Cornick v. Richards, 3 Lea (Tenn.) 1, 23.

when the sale is absolute, it is usual to issue new certificates to the party taking up the old. Such a practice facilitates the easy use of this property in commercial transactions. The requirement that the title could alone be transferred on the books of the corporation, or by notice to the corporation, would greatly tend to trammel this use, and, as far as we can see, notice to the corporation can serve no practical end, and has no appropriate place in the transaction, so far as passing the title from a holder to a purchaser, or the right of a creditor as to a purchaser, for he can, as he will always do, protect himself by requiring an assignment of the certificate and then a transfer on the books of the corporation. The rule requiring a transfer on the books of the corporation can only serve to give a creditor who has a judgment or attachment a legal advantage, who has never given credit on the faith of the stocks over the other who has advanced his money on them, and taken the evidence of his security by a transfer of the certificate. In such cases alone will the contest be likely to arise, as the party who intends to trust to the security of such property will always take the assignment. In such a contest the equities are altogether in favor of the assignee who has advanced his money on the faith of the collaterals."

VIII. *Liens upon Stock in Favor of the Corporation.*

§ 221. **That a corporation may itself have a lien by statute upon the shares of a stockholder** is everywhere conceded; and for this reason, also, no one is entitled to regard his security upon stock complete until it has actually been transferred to him upon the company's books. For instance, if the charter of a corporation not only provides that no assignment of stock shall be valid unless made upon the books of the company, but also provides that the corporation shall have a lien upon the stock of any shareholder indebted to the company for the payment of his debt, any one taking a transfer of the stock by delivery of the certificate, without a transfer upon the company's books, takes it subject to all the equitable rights

of the company against the apparent owner of the stock.[1] But the corporation has no lien upon the stock of a shareholder merely by virtue of a provision that the stock shall be transferable on the books of the company. Such a lien can not be implied: it must be expressly created;[2] and there is authority for holding that, under a by-law providing that the shares of a stockholder indebted to the corporation shall not be transferable, and that the certificates should contain notice of this provision, a pledge of certificates containing merely a notice that the stock is only transferable upon the books of the corporation gives to one taking such certificates, without notice of the owner's liability to the corporation or of such by-law, a title paramount to the equities of the corporation.[3] It may well be questioned, however, whether any notice of the by-law would be necessary, unless the by-law itself made it so. No lien upon stock exists at common law: it exists only by statutory authority, either expressed by general law, or by the act of incorporation, or by-laws made under such authority.[4]

[1] Union Bank v. Laird, 2 Wheat. 390; Pendergast v. Bank of Stockton, 2 Sawyer 108; Stebbins v. Phenix Fire Ins. Co., 3 Paige (N. Y.) 350; National Bank v. Watsontown Bank, 105 U. S. 217; *In re* Bigelow, 2 Ben. 469; Grant v. Mechanics' Bank of Phila., 15 S. & R. (Pa.) 140; Geyer v. Western Ins. Co., 3 Pitts. (Pa.) 41; Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513; Bohmer v. City Bank, 77 Va. 445; Petersburg Sav. & Ins. Co. v. Lumsden, 75 Va. 327; Vansands v. Middlesex Co. Bank, 26 Conn. 144; Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585; Newberry v. Detroit & Lake Superior Iron Co., 17 Mich. 141; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149; Cunningham v. Alabama Life Ins. & Trust Co., 4 Ala. 652; Farmers' Bank of Md. v. Iglehart, 6 Gill (Md.) 50; Burford v. Crandell, 2 Cranch C. C. 86; Bank of America v. McNeil, 10 Bush (Ky.) 54; *In re* Peebles, 2 Hughes 394. As to marshaling as between a corporation having a lien upon stock by charter, and the general creditors of an insolvent debtor, see German Security Bank v. Jefferson, 10 Bush (Ky.) 326.

[2] Bank v. Lanier, 11 Wall. 369; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Bryon v. Carter, 22 La. Ann. 98; Case v. Bank, 100 U. S. 446. As to the effect of a known usage, see Morgan v. Bank of N. A., 8 S. & R. (Pa.) 73, 11 Am. Dec. 575.

[3] Lee v. Citizens' Nat. Bank, 2 Cin. (Ohio) 298.

[4] Steamship Dock Co. v. Heron, 52 Pa. St. 280; Leggett v. Bank of Sing Sing, 24 N. Y. 283; Driscoll v. Bradley Mfg. Co., 59 N. Y. 96; Union Bank v. Laird, 2 Wheat. 390; New

Of course a corporation can not, under such a provision, maintain a lien for a liability of a stockholder accruing after the service of an attachment or a levy of an execution upon the stock;[1] and no lien can be created by force of a by-law adopted subsequently to the issuing of the stock.[2]

The taking of collateral security by a corporation is no waiver of a lien which the corporation has by its charter or by-laws upon the debtor's shares in such corporation. Therefore, the lien of the corporation upon the debtor's shares in such case is superior to any which the debtor can give by a transfer to another.[3] But where a by-law required the consent of the directors to a transfer of stock by one indebted to the company, but in the practice of the company this requirement was never enforced, a transfer by a stockholder, attested in the usual way by the secretary of the company, was held good, although he was indebted to the company.[4]

A by-law which is not expressly authorized by general law, or by the act of incorporation, is not notice of a lien thereby declared upon the stock of any stockholder indebted to the corporation.[5]

A provision incorporated into a certificate of stock of a national bank stating that "no transfer of the stock of this association shall be made, without the consent of the board of directors, by any stockholder who shall be liable to the association, either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends," is effective to create a lien in favor of the bank, as against a party to whom an instrument of assignment of the stock has been duly executed by the owner thereof, to secure

Orleans Nat. Banking Asso. v. Wiltz, 10 Fed. Rep. 330; Bryon v. Carter, 22 La. Ann. 98; McDowell v. Bank of Wilmington, 2 Del. 1; Cummings v. Webster, 43 Me. 192; Dearborn v. Washington Sav. Bank, 18 Wash. 8, 50 Pac. Rep. 575.

[1] Geyer v. Western Ins. Co., 3 Pitts. (Pa.) 41.

[2] Bryon v. Carter, 22 La. Ann. 98.

[3] Union Bank v. Laird, 2 Wheat. 390; *In re* Peebles, 2 Hughes 394.

[4] Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120. And see Upton v. Burnham, 3 Biss. 431.

[5] See 59 N. Y. 96.

an indebtedness, created at the time and in consideration thereof in favor of the assignee.[1]

§ 222. **In Connecticut** it is provided that every corporation shall at all times have a lien upon all stock owned by any person therein, for all debts due to it from him.[2] This statute, it was held, immediately upon going into effect, created a lien in favor of a corporation for an old indebtedness, upon stock which had previously been pledged to a third person, if such pledge was made merely by delivery of the certificate of the stock, with a power of attorney for its transfer, and no copy of the power of attorney had been filed with the corporation, or other notice given to it.

Since the passage of this statute it is not necessary that the corporation, in order to be able to claim the benefit of it, should issue certificates containing notice of any right of lien on the part of the corporation.[3]

§ 223. **But a corporation having notice that the stockholder has pledged his stock,** by a delivery of the certificate with a power to transfer the stock upon the books of the corporation, can not have a lien upon the stock for a credit afterwards extended to him upon the faith of its charter right to a lien to secure a stockholder's indebtedness. Such an equitable assignment of the stock affects one who has knowledge of it equally as much as if the transfer had been made upon the books. Notice to the executive officer of a corporation, such as the cashier of a bank, engaged in the active discharge of his duties, is notice to the corporation itself of such an equitable transfer; and such officer, knowing of the pledge of

[1] Buffalo German Ins. Co. v. Third Nat. Bank, 29 App. Div. (N. Y.) 137.

[2] G. S. 1888, § 1923. This statute went into operation the first day of January, 1875. First Nat. Bank v. Hartford Life and Annuity Ins. Co., 45 Conn. 22. Practically, the statute placed an attachment upon the stock in behalf of the corporation; it publicly recorded a completed lien for its security, and that would have been the precise effect of an attachment. Per Pardee, J.

[3] First Nat. Bank v. Hartford Life and Annuity Ins. Co., 45 Conn. 22.

the stockholder's certificate to secure a promissory note, is presumed to know that it remains in pledge for a renewal of the original note. Knowledge of the original transaction should put the officer upon inquiry as to the state of the stockholder's shares before the corporation gave him credit upon the faith of his having stock upon which a lien could attach in favor of the corporation.[1]

§ 224. **National banks can not claim such a lien.** Such banks are prohibited from loaning upon the security of their own stock, and from holding or purchasing their own stock, except when necessary to prevent loss on a debt previously contracted in good faith.[2] It is inconsistent with the policy of this act for a bank, by virtue of its articles of association or by-laws, to have a lien upon the shares of a stockholder for his indebtedness to the bank.[3] But such a bank may hold a cash dividend upon shares of its stock, as a pledge for the indebtedness of a stockholder to the bank; and a bank may attach the shares of a stockholder for his debt to the bank.[4]

[1] Case v. Bank, 100 U. S. 446, 454; Merchants' Bank v. State Bank, 10 Wall. 604, 650; Birmingham Trust & Savings Co. v. Louisiana Nat. Bank, 99 Ala. 379, 13 So. Rep. 112; Bank of America v. McNeil, 10 Bush (Ky.) 54. "The indebtedness this lien is intended to secure," said Lindsay, J., delivering the opinion of the court, "is such as may exist at the time the stockholder attempts to dispose of his stock. It is manifest that the lien can not become effectual for any purpose until the stockholder contracts a debt to the bank. Until this is done, his power to sell, give, devise, or incumber his stock is as perfect and complete as is his right so to dispose of or incumber any other personal property he may own. He can not pass the complete legal title to his stock except by a transfer entered upon the books of the bank, nor can he by any arrangement not made known to the bank deprive it of the right to look to his stock as an ultimate security for the payment of any indebtedness it may innocently permit him to incur; but he may, by bargain and sale, by gift, devise, or pledge, divest himself of title; and when he has done so, and notice has been given to the bank, it has no right to extend credit to him upon the faith of his charter lien upon his stock."

[2] 12 Stat. at Large, 675; Act of June 3, 1864.

[3] Bank v. Lanier, 11 Wall. 369; Bullard v. Bank, 18 Wall. 589; and see Evansville Nat. Bank v. Metropolitan Nat. Bank, 2 Biss. 527; Second National Bank v. National State Bank, 10 Bush (Ky.) 367.

[4] Hagar v. Union Nat. Bank, 63 Me. 509; Thompson's Nat. Bank Cases, 523.

§ 225. **A corporation may waive its lien upon a member's stock.** A statute of the state of Pennsylvania provides that the stock of a bank shall be transferable on the books of the corporation only in such manner as the by-laws shall ordain; but that stockholders indebted to the bank shall not transfer their stock without paying or securing the debt.[1] Certain shares of the stock of a state bank were transferred by a banking firm as collateral security, and the pledgee sent the certificate to the cashier, and requested a new certificate. The cashier of the bank, who was also a member of the banking firm, replied by letter, agreeing to transfer the stock in a short time, and credited the pledgee with the stock on the books of the bank. The firm shortly afterwards failed, with a large indebtedness to the bank, which thereupon refused to transfer the stock. On a bill in equity to compel such transfer, it was held that the act of the cashier, which was within his customary duties, was binding upon the bank, and effected a waiver of its lien upon the stock.[2] Mr. Justice Matthews, delivering the opinion of the court, said: "A complete transfer of the title to the stock upon the books of the bank, it is not doubted, would have the effect to vest it in the transferee, free from any claim or lien of the bank. The consent of the bank, made necessary to such transfer, is the waiver of its right, as its refusal would be the assertion of it. The transfer, when thus consummated, destroys the relation of membership between the corporation and the old stockholder, with all its incidents, and creates an original relation with the new member, free from all antecedent obligations. This legal relation and proprietary interest, on which it is based, are quite independent of the certificate of ownership, which is mere evidence of title. The complete fact of title may very well exist without it. All that is necessary, when the transfer is required by law to be made upon the books of the corporation, is, that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books. For

[1] Act of April 10, 1850, Bank Act, art. 10, § 10.

[2] National Bank v. Watsontown Bank, 105 U. S. 217, 222, 4 Morrison's Trans. 400, 14 Rep. 230.

this purpose the account in a stock ledger showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment, or by derivation from others, is quite suitable, and fully meets the requirements of the law." Even on the supposition that not the legal title, but only an equity based on an executory contract for a transfer, passed to the pledgee, it was further held, in the case last referred to, that the bank had, by its own laches, lost the legal right to assert its lien, for if the bank had intended to insist on its legal rights, and assert its lien, the time to do this was when the pledgee made his claim for a transfer of the stock; but, so far from doing this, it permitted the pledgee to rest in the belief that the right to transfer the stock would not be questioned, its action being equivalent to a declaration that it had no adverse claim. Therefore, upon the failure of the stockholder, the bank can not be permitted to assert a lien, the enforcement of which would operate as a fraud upon the pledgee.

§ 226. **Damages for refusing to make transfer.**—If a pledgee of the stock of a bank applies to the cashier to have a transfer made to himself upon the books, and this officer refuses to allow the transfer, on the ground that the pledgor is indebted to the bank, and it appears that the bank is not entitled to such a lien, upon its failure, and the appointment of a receiver, the pledgee may recover damages for the loss sustained by him.[1]

[1] Case v. Bank, 100 U. S. 446.

CHAPTER VI.

PLEDGES OF BILLS OF LADING.

I. *Bills of Lading are Symbols of Property.*

§ 227. **In general.**—Bills of lading or receipts for goods by common carriers have become a very important, as well as a very common form of collateral security. Such bills or receipts represent the goods themselves, and the delivery of such bills or receipts as collateral security generally amounts to a symbolical delivery in pledge of the goods themselves; yet the use of bills of lading and shippers' receipts as security gives rise to many questions and considerations wholly different from those that arise under pledges of goods in the ordinary mode of an actual delivery of the goods to the pledgee; and therefore, this use of the documentary evidence of property in the possession of the carrier is entitled to treatment as a separate branch of the subject of collateral securities.

§ 228. **An effectual delivery of goods may be made in pledge,** by transfer of a bill of lading, or shipping receipt.[1] The trans-

[1] Lickbarrow v. Mason, 1 H. Bl. 35, 360; 1 Smith's Lead. Cas. 8th Eng. ed. 753; Newsom v. Thornton, 6 East 17, 41; Hatfield v. Phillips, 9 M. & W.

fer of a bill of lading as collateral security is regarded not only as passing the legal title to the property, but as constituting an actual delivery and change of possession of the property.[1] Such bill of lading or receipt may be made out directly to the pledgee, or may be indorsed to him. If not made out directly to him, it should be indorsed to him, for the sending it unindorsed by letter containing no words of transfer, might give the person receiving it no claim to the property.[2] A bill of lading properly indorsed to the consignee who has made advances, is evidence of a delivery of the property, although it be signed by one who was not in fact the master of the vessel, and had no authority to sign it, but was supposed by the consignor to be the master, and was personally acting as such.[3]

§ 229. **The delivery of a bill of lading is a constructive or symbolical delivery of the property represented by it.**[4] The

647; Meyerstein v. Barber, 2 L. R. C. P. 38, 45; Barber v. Meyerstein, L. R. 4 H. L. 317; Douglas v. People's Bank, 86 Ky. 176, 5 S. W. Rep. 420; Petitt v. First Nat. Bank, 4 Bush (Ky.) 334; May v. McGaughey, 60 Ark. 357, 30 S. W. Rep. 417; Neill v. Rogers Bros.' Produce Co., 41 W. Va. 37, 23 S. E. Rep. 702.

So by statute in *Georgia:* 2 Code 1895, § 2956.

[1] First Nat. Bank of Cincinnati v. Kelly, 57 N. Y. 34.

[2] Stone v. Swift, 4 Pick. (Mass.) 389, 16 Am. Dec. 349; and see Merchants' Nat. Bank v. Bangs, 102 Mass. 291; Forbes v. Boston & Lowell R. Co., 133 Mass. 154.

[3] Prince v. Boston & Lowell R. Co., 101 Mass. 542, 100 Am. Dec. 129.

[4] Barber v. Meyerstein, L. R. 4 H. L. 317, 326, L. R. 2 C. P. 38, 661; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Cayuga Co. Nat. Bank v. Daniels, 47 N. Y. 631; Harrison v. Mora, 150 Pa. St. 481, 24 Atl. Rep. 705; Skilling v. Bollman, 6 Mo. App. 76; National Bank of Green Bay v. Dearborn, 115 Mass. 219; Forbes v. Boston & Lowell R. Co., 133 Mass. 154; First Nat. Bank v. Dearborn, 115 Mass. 219; Hathaway v. Haynes, 124 Mass. 311; First Nat. Bank v. Crocker, 111 Mass. 163; McCants v. Wells, 4 S. C. 381; Adoue v. Seeligson, 54 Tex. 593; Taylor v. Turner, 87 Ill. 296; Petitt v. First Nat. Bank, 4 Bush (Ky.) 334; First Nat. Bank v. Northern R., 58 N. H. 203; Farmers' & Mechanics' Nat. Bank v. Logan, 74 N. Y. 568; Means v. Bank of Randall, 146 U. S. 620, 627, 13 S. C. Rep. 186; Dows v. Nat. Exch. Bank, 91 U. S. 618; Marine Bank v. Fiske, 71 N. Y. 353; City Bank v. Rome, W. & O. R. Co., 44 N. Y. 136; Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. Rep. 151; Holmes v. German Security Bank, 87 Pa. St. 525; Emery v. Irving Nat. Bank, 25 Ohio St. 360, 366, 18 Am. Rep. 299; Dodge v. Meyer, 61 Cal. 405, 416, 10 Pac. Coast L. J. 169;

person who takes a bill of lading for a valuable consideration, whether this arises at the time, or rests upon a previously existing debt, has the right to the property without taking actual possession of it, or doing any further act to perfect this title.[1] The bill of lading stands in place of the property covered by it. It represents the property. "When the right of possession is changed by a sale or pledge of the property itself, the transfer of the bill of lading operates as a change of possession of the property, the carrier in the meantime being the custodian for the real owner or party in interest. While a bill of lading is not a negotiable instrument in the sense in which a bill of exchange or promissory note is negotiable, yet as the representative of a valuable commodity it is assignable to the party entitled to control the possession of that commodity, to the same extent and for the same purposes as the property itself would be if corporeally present. Inasmuch, therefore, as these instruments are capable of performing very important functions in commercial transactions, innocent holders thereof for value ought to receive the same protection as if they held possession of the property itself."[2]

A cotton factor in Galveston procured an advance of money from a banker on certain cotton in press, for which he gave his order to deliver the cotton to a vessel then in port loading for Liverpool. Notice of the order was given to the press, and the master of the vessel made and delivered to the cotton factor, a bill of lading for the cotton, which the factor indorsed and delivered to the banker, with a bill of exchange on Liver-

Brent v. Miller, 81 Ala. 309, 8 So. Rep. 219; Glidden v. Lucas, 7 Cal. 26; Tison v. Howard, 57 Ga. 410; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; First Nat. Bank v. Harkness, 42 W. Va. 156, 168, 24 S. E. Rep. 548, quoting text; Neill v. Produce Co., 41 W. Va. 37, 56, 23 S. E. Rep. 702, quoting text.

[1] Dows v. Nat. Exch. Bank, 91 U. S. 618; Skilling v. Bollman, 6 Mo. App. 76; Farmers' & Mechanics' National Bank v. Logan, 74 N. Y. 568; Grove v. Brien, 8 How. 429; Adoue v. Seeligson, 54 Tex. 593; Forbes v. Boston & Lowell R. Co., 133 Mass. 154; First Nat. Bank v. Northern R., 58 N. H. 203.

[2] Stone v. Wabash, St. Louis & Pacific R. Co., 9 Bradw. (Ill.) 48.

pool attached. While the cotton was still in press an execution against the factor was levied upon it; but it was held that there had been a constructive delivery of it by the factor to the banker, and that the delivery of the bill of lading was as effectual to transfer the cotton as a manual delivery of it would have been.[1] The delivery in this case was held to meet the special requisite of an effectual pledge, which is, that no matter in whose hands the property may be deposited, it shall no longer be subject, in fact or in law, to the dominion, possession or control of the pledgor, but to that of the pledgee. The execution of the delivery order by the factor to the vessel for the cotton in press, and the recognition and acceptance of it by the press, constituted a delivery of the cotton to the vessel; and therefore the execution of the bill of lading by the master of the vessel, and the delivery of this to the banker, completed the transfer to him.

§ 230. **A bill of lading merely represents the property;** and a transfer of the bill of lading operates merely to transfer the same rights of property that would arise from a transfer of the property itself. One in possession of property can transfer no greater rights than he possesses; and so one in possession of a bill of lading can transfer no greater rights than he has in that.[2]

"Bills of lading stand as the substitute and representative of the goods described therein, and while *quasi*-negotiable instruments are not negotiable in the full sense in which that term is applied to bills and notes, the transfer of the bill passes to the transferee the transferrer's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is

[1] Adoue v. Seeligson, 54 Tex. 593.

[2] Dows v. National Exch. Bank, 91 U. S. 618; Skilling v. Bollman, 73 Mo. 665, 39 Am. Rep. 537; Kirkpatrick v. Kansas City, St. Jo. & C. B. R. Co., 86 Mo. 341; Missouri Pac. R. Co. v. McLiney, 32 Mo. App. 166; Dickson v. Merchants' Elevator Co., 44 Mo. App. 498.

given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it.'"[1]

A bill of lading is not like a negotiable instrument which passes by delivery to a *bona fide* transferee for value without regard to the title of the person who makes the transfer.[2] "In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense.'"[3]

§ 231. **An indorsement or delivery of a bill of lading as collateral security passes a special property in the goods,** and not an absolute legal title to them, or the whole and complete ownership of them, but the delivery is as complete as if the goods themselves had been delivered.[4] The transaction is ordinarily a pledge and not a mortgage, because it is ordinarily

[1] The Carlos F. Roses, 177 U. S. 655, 665, per Fuller, C. J., citing Pollard v. Vinton, 105 U. S. 7; Shaw v. Railroad Company, 101 U. S. 557. In Georgia it is provided by statute that delivery of property is essential to this bailment, but promissory notes and evidences of debt, warehouse receipts, elevator receipts, bills of lading or other commercial paper symbolic of property, may be delivered in pledge. The delivery of title deeds creates no pledge. Code 1895, § 2956.

[2] Gurney v. Behrend, 8 El. & Bl. 622; Dows v. Perrin, 16 N. Y. 325; Dows v. Greene, 24 N. Y. 638.

[3] Pollard v. Vinton, 105 U. S. 7, 8, per Miller, J.

[4] Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. Rep. 608; Neill v. Rogers Bros.' Produce Co., 41 W. Va. 37, 23 S. E. Rep. 702.

the intention of the parties to such a contract, either as expressed or to be implied from the transaction itself, that such shall be its effect. The effect of such a transaction is well described by Mr. Justice Field in a recent case in the Queen's Bench Division.[1] "Now advances against deposit of goods are probably some of the most ordinary transactions either of common or commercial life, and if there is delivery, and there are no terms expressed either verbally or in writing giving any larger effect to the contract, the latter is known as a contract by way of 'pawn or pledge,' the legal effect of which is

[1] Burdick v. Sewell, 10 Q. B. D. 363, 366.

The learned judge criticises the language of Brett, L. J., in the recent case of Glyn v. East and West India Docks Co., 6 Q. B. D. 475, 480, where he says that the legal effect of the indorsement of the bill of lading as security for advances was to transfer the legal property in the goods to the indorsee, and a consequent right in law of immediate actual possession against all the world, unless some one has an independent superior right of temporary possession; and that such indorsement has the same effect as a bill of sale has by the common law to pass the legal property in goods; and that the right of the indorser is an equity merely, though this may be recognized by the common law courts. Upon this Mr. Justice Field remarks: "I apprehend, however, that the language of the learned lord justice in that case, must be read as applied to the facts of that particular case, and as I, on the hearing of that case, which was tried before me without a jury, came to the conclusion that the intention of the parties and the implication of law from the dealings was that the whole and entire property did pass, I agree in the view of the lord justice thus limited and understood." Bramwell, L. J., however, considered the transaction in that case as not amounting to anything more than a pledge, giving the indorser of the bill of lading a special property and right of possession.

Mr. Justice Field then proceeds to review some of the cases as to the effect of an indorsement of a bill of lading as collateral security, from the leading case of Lickbarrow v. Mason, 1 Sm. L. C., 7th Eng. ed., p. 756, down to Meyerstein v. Barber, L. R. 4 H. L. 317. In regard to the latter case he says that while in the court of common pleas and in the Exchequer Chamber everybody treated the transaction as a pledge, Lord Hatherly and Lord Westbury in the House of Lords used expressions which appear to be to the effect that by the indorsement the whole property passed. But he doubts whether these expressions were intended to mean anything more than that sufficient property passed to enable the pledgee to maintain n action for conversion, and that the indorsement, *per se*, amounted to a delivery. He comes to the conclusion as stated in the text that by such an indorsement the parties intend nothing more than a pledge: and this is the generally accepted doctrine.

that only a special property passes from the borrower to the lender, although coupled with the power of selling the pledge and transferring the whole property in it on default in payment at the stipulated time, if there be any, or at a reasonable time after demand and non-payment, if no time for repayment be agreed upon.[1] Moreover, until such default, although the lender may assign the pledge to another to the limited extent of his own interest in it, *i. e.*, as a security for the amount due, he can not pass the whole and entire property in the goods to another, for by the contract the general property remains in the pawnor, who by virtue of that general property may determine the special property by tender of the secured amount, and may immediately recover the pledge on refusal in a possessory action. Delivery is, however, an essential element of every contract by way of pledge. Such delivery may be actual, as in the every-day life transaction with the pawnbroker, or it may be constructive, either by making the custody of the pledgor that of the pledgee,[2] or if the goods are still under the operation of a bill of lading, by indorsement of the bill; and it is the latter form of the transaction which is one very commonly adopted in commerce. As, however, in the case of land, by a conveyance by way of mortgage, so also in that of goods, a more effective security may be created by bill of sale, and by the usual terms of such an instrument the whole and entire property in the goods is assigned and passes to the lender, subject to usual stipulations as to possession and sale, but leaving nothing in the way of legal property in the borrower, only an equitable right to redeem. This latter form of security, although very usual in money-lending transactions of a mere individual character, is not, I believe, usually adopted in those purely commercial transactions where advances are obtained against goods represented either by warrants or bills of lading; these being two of the ordinary modes by which goods are made a security for an advance and within

[1] Pothonier v. Dawson, Holt N. P. 383; Donald v. Suckling, L. R. 1 Q. B. 585.

[2] Reeves v. Capper, 5 Bing. N. C. 136, 140.

one of which the transaction now in question must be ranged. The question in the present case resolves itself into whether the security was intended to operate, or by implication of law arising upon the undisputed facts did operate, in the same way as an assignment by bill of sale or as a mere pledge."

In this case it was determined that the shipper of goods does not, by simply indorsing the bill of lading, and delivering it to the indorsee, by way of security for money advanced by him, pass the property in the goods to such indorsee, so as to make him directly liable to the shipowner for freight under a statute which transfers the liability for freight from the shipper to the indorsee of a bill of lading.

§ 231a. **Even a delivery of a bill of lading as security for a loan, without any indorsement, is held to be a valid pledge,** and to operate as a symbolical delivery, of the goods represented by such bill of lading. Chief Justice Shaw stated the law to this effect, saying: "Even a sale or pledge of the property without a formal bill of lading, by the shipper, would operate as a good assignment of the property; and the delivery of an informal or unindorsed bill of lading or other documentary evidence of the shipper's property would be a good symbolical delivery, so as to vest the property in the plaintiffs."[1]

This is the rule, although the bill of lading contains no words of negotiability,[2] or even contains the words, "This receipt is not transferable."[3]

[1] Allen v. Williams, 12 Pick. (Mass.) 297, 301; followed in Hathaway v. Haynes, 124 Mass. 311; First Nat. Bank v. Dearborn, 115 Mass. 219, 228, 15 Am. Rep. 92; Lewis v. Springville Banking Co., 166 Ill. 311, 46 N. E. Rep. 743; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Western Union R. Co. v. Wagner, 65 Ill. 197; Scharff v. Meyer, 133 Mo. 428, 34 S. W. Rep. 858, 42 Cent. L. J. 367; Skilling v. Bollman, 6 Mo. App. 76; Petitt v. Memphis First Nat. Bank, 4 Bush (Ky.) 334; Jeffersonville, Madison & Indianapolis R. Co. v. Irvin, 46 Ind. 180; Becker v. Hallgarten, 86 N. Y. 167; Merchants' Bank v. Union R. & T. Co., 69 N. Y. 373, 376; Rochester Bank v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Richardson v. Nathan, 167 Pa. St. 513, 31 Atl. Rep. 740; Holmes v. Bailey, 92 Pa. St. 57; Holmes v. German Security Bank, 87 Pa. St. 525; Campbell v. Alford, 57 Tex. 159.

[2] Emery v. Irvin Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Rochester Bank v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; City Bank v. Rome, W. & O. R. Co., 44 N. Y. 136; Davenport Nat. Bank v. Homeyer, 45 Mo. 145, 100 Am. Dec. 363.

[3] Peters v. Elliott, 78 Ill. 321.

§ 232. A previously existing debt is a sufficient consideration for the delivery of a bill of lading.[1] There are authorities which hold that a consideration paid at the time of the indorsement or delivery of the bill of lading is essential for passing the title to the property as against the consignor's right to stop the goods *in transitu*, or as against a subsequent purchaser of the goods for a new consideration.[2]

But the prevailing rule is, that a delivery of a bill of lading as security for a past debt is equally effectual with a delivery for a present advance to vest the property in the creditor.

II. *How Far Negotiable Instruments.*

§ 233. A bill of lading whereby the carrier engages to deliver goods to the shipper or his order is quasi-negotiable; but not negotiable in the manner that bills of exchange and promissory notes are negotiable.[3] They are not negotiable in

[1] Leask v. Scott, 2 Q. B. D. 376; Skilling v. Bollman, 6 Mo. App. 76; Tiedeman v. Knox, 53 Md. 612; Peters v. Elliott, 78 Ill. 321. See, however, Loeb v. Peters, 63 Ala. 243; Lesassier v. Southwestern R. Co., 2 Woods 35. See §§ 107-133.

[2] Parsons on Shipping, 193. The cases cited by the learned author in support of this view arose out of attempts on the part of factors to pledge their principals' goods for their own debts, and do not support his text. Newsom v. Thornton, 6 East 17, was decided, not upon the ground that an assignment for prior advances passed no title to the bill of lading, but that a factor had no right to pledge the bill. The case was, that the holder of a bill of lading, the factor of the consignor, attempted to pledge the bill of lading on condition of advances to be made; the advances were not made; the pledgee claimed to hold the goods for former advances made by him to the factor, and it was held that the factor had no power to pledge the goods of his principal by indorsement and delivery of the bill of lading. Warner v. Martin, 11 How. 209, is a similar case, and turns altogether upon the question of the power of a factor to pledge. Per Bakewell, J., in Skilling v. Bollman, 6 Mo. App. 76.

[3] Rowley v. Bigelow, 12 Pick. (Mass.) 307, per Shaw, C. J., 23 Am. Dec. 607; Allen v. Williams, 12 Pick. (Mass.) 297; Cox v. Central Vt. R. Co., 170 Mass. 129, 49 N. E. Rep. 97; Stollenwerck v. Thacher, 115 Mass. 224; Hale v. Milwaukee Dock Co., 29 Wis. 482, 9 Am. Rep. 603; Douglas v. People's Bank, 86 Ky. 176, 5 S. W. Rep. 420; Missouri Pacific R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. Rep. 608, 27 Am. St. Rep. 861; Voss v. Robertson, 46 Ala. 483; Pattison v. Culton, 33 Ind. 240, 5 Am. Rep. 199; Davenport Nat. Bank v. Homeyer, 45 Mo. 145; Barnard v. Campbell, 56 N. Y. 462.

this sense, even when made negotiable in terms by statute,[1] unless in express terms made negotiable in the same sense that bills of exchange and promissory notes are negotiable, as is the case in several states.[2]

As the statutes of several states introduce an important qualification of the common law doctrine upon this subject, and as they are enacted in different terms, a full statement of the statutes is here given.

§ 234. **California,[3] Montana,[4] North Dakota,[5] Oklahoma,[6] South Dakota,[7] Washington.[8]**—All the title to the freight which the first holder of a bill of lading had when he received it, passes to every subsequent indorsee thereof in good faith, and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange. When a bill of lading is made to "bearer," or in equivalent terms, a simple transfer thereof, by delivery, conveys the same title as an indorsement.

§ 234a. **Louisiana.**—All receipts, bills of lading, vouchers or other documents, issued by any cotton-press owner or lessee, wharfinger, forwarder or other person, boat, vessel, railroad, transportation or transfer company, as by this act provided, shall be negotiable by indorsement in blank or by special indorsement, in the same manner and to the same extent as bills of exchange and promissory notes now are.[9]

§ 235. **Maryland.[10]**—All bills of lading and all receipts, vouch-

[1] See § 241.

[2] See §§ 234, 235.

[3] Civil Code, §§ 2127, 2128; Newhall v. Central Pac. R. Co., 51 Cal. 345; Dodge v. Meyer, 61 Cal. 405.

[4] 1 Codes 1895; Civ. Code, §§ 2831, 2832.

[5] R. Code 1896, §§ 2199, 2200 of Civ. Code.

[6] Comp. Stats. 1893, §§ 461, 462.

[7] Annot. Stats. 1899, §§ 5045, 5046.

[8] Code 1896, §§ 2217, 2218.

[9] R. Laws 1897, § 2485. But it is held that bills of lading are also transferable by delivery. Crowell v. Van Bibber, 18 La. Ann. 637.

[10] Rev. Code 1878, p. 298, art. 35, § 12; 1 Pub. Gen. Laws, p. 117, § 1. This statute is more comprehensive and sweeping in its phraseology and effect than the statutes of Missouri and Pennsylvania recently construed by the supreme court in Shaw v. Railroad Co., 101 U. S. 557. Shortly be-

ers, or acknowledgments whatsoever, in writing, in the nature or stead of bills of lading for goods, chattels, or commodities of any kind, to be transported on land or water, or on both, which shall be executed in this state, or being executed elsewhere, shall provide for the delivery of goods, chattels, or commodities of any kind within this state, and all warehouse, elevator, or storage receipts whatever, for goods, chattels, or commodities of any kind stored or deposited, or in said receipts stated or acknowledged to be stored or deposited, for any purpose in any warehouse, elevator, or other place of storage or deposit in this state, shall be, and they are hereby, constituted and declared to be negotiable instruments and securities, unless it be provided in express terms to the contrary on the face thereof, in the same sense as bills of exchange and promissory notes, and full and complete title to the property and said instruments mentioned or described, and all rights and remedies incident to such title, or arising under or derivable from the said instruments, shall inure to, and be invested in, each and every *bona fide* holder thereof for value, altogether unaffected by any rights or equities whatsoever of or between the original or any other prior holders of or parties to the same, of which such *bona fide* holder for value shall not have had actual notice at the time he became such.

Under this statute an antecedent debt is sufficient to constitute a purchase for value of a bill of lading, and a party receiving it in payment of, or as security for, such a debt, becomes a purchaser and *bona fide* holder for value as effectually as if it had been a bill of exchange or promissory note.[1]

§ 236. **Minnesota.**[2]—Warehouse receipts, given for any goods, wares and merchandise, grain, flour, produce, or other

fore this statute was passed, the supreme court of Maryland had decided that the law does not regard bills of lading as negotiable in the same sense in which a bill of exchange and promissory note is so, Balt. & Ohio R. Co. v. Wilkins, 44 Md. 11, 27, 22 Am. Rep. 26, and the statute was evidently passed in order to change the law as fixed by the decision, and uses the very language of the decision. Tiedeman v. Knox, 53 Md. 612.

[1] Tiedeman v. Knox, 53 Md. 612.

[2] G. S. 1894, § 7649.

commodity, stored or deposited with any warehouseman, or other person or corporation in this state, or bills of lading, or receipts for the same, when in transit by cars or vessels to any such warehouseman, or other person, shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading; and any person to whom the said receipt or bill of lading may be transferred, shall be deemed and taken to be the owner of the goods, wares or merchandise therein specified, so as to give security and validity to any lien created on the same subject to the payment of freight and charges thereon; provided, that all warehouse receipts, or bills of lading which shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.[1]

§ 237. **Missouri.**[2]—All receipts issued or given by any warehouseman, or other person or firm, and all bills of lading, transportation receipts, and contracts of affreightment, issued or given by any person, boat, railroad, or transportation or transfer company, for goods, wares, merchandise, grain, flour, or other produce, shall be and are hereby made negotiable by written indorsement thereon and delivery in the same manner as bills of exchange and promissory notes; and no printed or written conditions, clauses, or provisions inserted in or attached to any such receipts, bills of lading, or contracts, shall in any way limit the negotiability or affect any negotiation thereof, nor in any manner impair the right and duties of the parties thereto, or persons interested therein; and every such condition, clause, or provision purporting to limit or affect the

[1] For construction of this act, see McCabe v. McKinstry, 5 Dill. 509; Rahilly v. Wilson, 3 Dill. 420.

[2] R. S. 1899, §§ 5053, 5054; Laws 1869, p. 91, § 1. See Central Savings Bank v. Garrison, 2 Mo. App. 58. As to the negotiability of bills of lading under this statute, see decision of the supreme court of the United States passing upon this statute, Shaw v. Railroad Co., 101 U. S. 557, stated in § 241, *infra*.

In another case the same court, passing upon this statute, held that the indorsement must be in writing. Allen v. St. Louis Bank, 120 U. S. 20, 7 S. C. Rep. 460.

rights, duties, or liabilities created or declared in this act, shall be void, and of no force or effect.

Warehouse receipts given by any warehouseman, wharfinger, or other person or firm, for any goods, wares, merchandise, grain, flour, or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind, given by any carrier, boat, vessel, railroad, transportation, or transfer company, may be transferred by indorsement in writing thereon, and the delivery thereof, so indorsed; and any and all persons to whom the same may be so transferred shall be deemed and held to be the owners of such goods, wares, merchandise, grain, flour, or other produce or commodity, so far as to give validity to any pledge, lien, or transfer, given, made, or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered, except on surrender and cancellation of such receipts and bills of lading; provided, however, that all such receipts and bills of lading, which shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

§ 238. **New York.**[1]—Bills of lading for any goods, wares, merchandise, grain, flour, produce, or other commodity, may be transferred by indorsement thereof; and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the goods therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person. But this provision does not apply to bills of lading which shall have the words "not negotiable" plainly written or stamped on the face thereof.

§ 239. **Pennsylvania.**[2]—Warehouse receipts given for any goods, wares, merchandise, grain, flour, produce, petroleum or other commodity, stored or deposited with any warehouseman,

[1] 3 R. S., 7th ed., 1882, p. 2260. See as to Warehouse Receipts, c. VII.

[2] Brightly's Purdon's Dig. 1873, p. 114, § 1; Brightly's Purdon's Dig. 1894, p. 165, § 1.

wharfinger or other person in this state, or bills of lading or receipts for the same when in transit by cars or vessels to any such warehouseman, wharfinger, or other person, shall be negotiable, and may be transferred by indorsement and delivery of said receipt or bill of lading; and any person to whom the said receipt or bill of lading may be so transferred shall be deemed and taken to be the owner of the goods, wares, and merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon; and no property on which such lien may have been created shall be delivered by said warehouseman, wharfinger, or other person, except on the surrender and the cancellation of said original receipt or bill of lading; or, in case of partial sale or release of the said merchandise, by the written assent of the holder of said receipt or bill of lading, indorsed thereon; provided, that all warehouse receipts or bills of lading which shall have the words, "not negotiable," plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

This statute is in derogation of the common law, and to bring a case within the statute all its requirements must be shown to exist, as, for instance, that the warehouse receipt is issued by a *bona fide* warehouseman.[1]

§ 240. **Wisconsin.**[2]—Warehouse receipts, bills of lading, or railroad receipts given for any goods, wares, merchandise, lumber, timber, grain, flour, or other produce or commodity stored, shipped, or deposited with any warehouseman, wharfinger, vessel, boat or railroad company or other person, on the face of which shall not be plainly written the words "not negotiable," may be transferred by delivery, with or without indorsement thereof; and any person to whom the same may be so transferred, shall be deemed and taken to be the owner of the goods, wares, and merchandise therein specified, so far as to give validity to any pledge, lien, or transfer made or created by

[1] Moors v. Jagode, 195 Pa. St. 163, 45 Atl. Rep. 723.

[2] R. S. 1878, p. 1011, § 4194; p. 1049, § 4425.

such person or persons; but no such property shall be delivered except on surrender and cancellation of said original receipt or bill of lading or the indorsement of such delivery thereon, in case of partial delivery.

Any such receipt, bill of lading, voucher, or other document by any warehouseman, wharfinger, master of a vessel or boat, or any officer, agent or clerk of any railroad, express or transportation company shall be transferable by delivery thereof without indorsement or assignment, and any person to whom the same is so transferred shall be deemed and taken to be the owner of the property therein specified, so far as to give validity to any pledge, lien or transfer, made or created by such person, unless such receipt, bill of lading, voucher, or other document shall have the words, "not negotiable," plainly written or stamped on the face thereof.

§ 241. **A statute declaring bills of lading negotiable, does not give them all the qualities of negotiable bills and notes.**[1] Negotiation primarily means a transfer by indorsement and delivery, giving the indorsee a right to sue upon the contract in his own name. In regard to bills and notes, certain other consequences generally follow negotiability, such as the liability of the indorser after due demand and notice, and the right of a holder in good faith and for value before maturity to full protection against even the true owner, so that nothing short of *mala fides* on his part will defeat his right. Bills of exchange and promissory notes are contracts exceptional in their character, and have been given their exceptional character be-

[1] Shaw v. Railroad Co., 101 U. S. 557, 565, 37 Leg. Int. 135, 10 N. Y. Weekly Dig. 263, 10 Rep. 129; Hunt v. Mississippi Cent. R. Co., 29 La. Ann. 446; National Bank v. Atlanta & Charlotte Air Line R. Co., 25 S. C. 216; Douglas v. People's Bank, 86 Ky. 175, 5 S. W. Rep. 420, 9 Am. St. Rep. 276.

In Maryland the statute is broader in terms, and makes bills of lading negotiable in the same sense as bills of exchange and promissory notes. In this respect the statute changes the law as it had just previously been established by the supreme court of that state in Baltimore & Ohio R. Co. v. Wilkins, 44 Md. 27, 22 Am. Rep. 26. See Tiedeman v. Knox, 53 Md. 612, where this change is commented upon.

sesses all the properties of a bill of exchange; but it would lead to absurdity to carry the doctrine to that length. The word 'negotiable' was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only."

While generally an indorsee for value of a bill of lading may bring an action in his own name for the goods, he can not generally maintain an action in his own name on the instrument itself.[1]

§ 243. **The indorsement of a bill of lading by the shipper only assigns his rights and the title** to the property called for by the bill. It involves no duty on his part to do anything toward forwarding the property, and therefore he is not liable in assumpsit for failure to ship and deliver the property. If the bill of lading be fictitious, or if there was any fraud practiced in obtaining advances upon a transfer of it, any remedy that the pledgee may have is one for that special wrong. He can not imply from the indorsement of the bill of lading a promise to perform what the carrier had agreed, or purported to have agreed, to do.[2]

An indorsement of a bill of lading by stamping the name of the assignor on the back of it, and a delivery of it so indorsed, is a sufficient compliance with a statute requiring assignments of bills of lading to be in writing.[3]

§ 244. **One making advances upon a bill of lading to one who is not the owner of the property** therein described, acquires no right of property therein. Although possession is *prima facie* evidence of ownership, yet that alone does not de-

[1] Thompson v. Dominy, 14 M. & W. 403; Dows v. Cobb, 12 Barb. (N. Y.) 310, 316; Blanchard v. Page, 8 Gray (Mass.) 281, 298.

This, of course, is a statement of the common law of the subject. Under modern codes of procedure the real party in interest is authorized to sue on any contract or chose in action which has been transferred to him in his own name. Merchants' Bank v. Union R. & Trans. Co., 69 N. Y. 373, 380, per Miller, J.

[2] Maybee v. Tregent, 47 Mich. 495, 11 N. W. Rep. 287.

[3] Horner v. Missouri Pac. R. Co., 70 Mo. App. 285.

prive the true owner of his title. "Taking possession of the property, shipping it, obtaining bills of lading from the carriers, indorsing away the bills of lading, or even selling the property and obtaining a full price for it, can have no effect upon the right of the owner. Even a *bona fide* purchaser obtains no right by a purchase from one who is not the owner, or not authorized to sell."[1] Therefore, if an owner of cotton authorizes another person to ship it, but gives the agent no authority to ship in his own name, the latter, by shipping in his own name, and taking a bill of lading accordingly, can not, by negotiating this, charge the cotton with the payment of advances made on the faith of such bill of lading.[2]

III. *How Far Binding upon the Carrier.*

§ 245. **A bill of lading represents the goods to be in the hands of the carrier.** If, through inadvertence or otherwise, the bill of lading is signed before the goods have come to hand, but they are afterwards received and shipped, the bill of lading operates upon the goods by way of relation and estoppel; and one who accepts or discounts drafts on the security of such bill of lading, obtains a title to the goods as valid and effectual as he could obtain by an actual delivery to him of the goods themselves.[3]

§ 246. **A carrier is not bound by a bill of lading signed by an agent without an actual delivery of the goods** to the carrier, al-

[1] The Idaho, 93 U. S. 575, 583, per Strong, J. And so in Covill v. Hill, 4 Den. (N. Y.) 323, 327, it was said: "It is a principle of the common law which has but few exceptions, that a man can not be divested of his property without his consent. And although possession is one of the most usual evidences of title to personal chattels, yet, as a general rule, mere possession will not enable a man to transfer a better title than he has himself, or than he has been authorized by the owner to grant. Exceptions in favor of trade are allowed in the case of money and negotiable instruments. But as to other personal chattels, the mere possession, by whatever means it may have been acquired, if there be no other evidence of property, or authority to sell, from the true owner, will not enable the seller to give a good title."

[2] Moore v. Robinson, 62 Ala. 537.

[3] Rowley v. Bigelow, 12 Pick. (Mass.) 307, 312, 23 Am. Dec. 607.

though the bill of lading be assigned to a person who in good faith discounts a draft attached to it. It has long been the prevailing rule that the master of a ship can not bind the owners by issuing bills of lading for goods not actually delivered on board the ship.[1] The same rule applies with greater force in the case of an agent of a railroad company.[2] In other words, a bill of lading, whether issued by the master of a vessel or by the agent of any carrier, is not a commercial or negotiable paper in the hands of an innocent party, which precludes or estops the owner from denying that the freight was received as therein admitted.[3] In a very recent case before the supreme court of the United States, involving the point under consideration, Mr. Justice Miller said:[4] "A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to

[1] Brown v. Powell Duffryn Steam Coal Co., L. R. 10 C. P. 562; Grant v. Norway, 10 C. B. 665; Coleman v. Riches, 16 C. B. 104; Hubbersty v. Ward, 8 Exch. 330; McLean v. Fleming, L. R. 2 H. L. 128, by statute; Mackay v. Commercial Bank, L. R. 5 P. C. 394; Jessel v. Bath, L. R. 2 Ex. 267; Schooner Freeman v. Buckingham, 18 How. 182; The May Flower, 3 Ware 300; The Loon, 7 Blatchf. 244; Pollard v. Vinton, 105 U. S. 7, 13 Rep. 545; Walter v. Brewer, 11 Mass. 99; Sears v. Wingate, 3 Allen (Mass.) 103; Dean v. King, 22 Ohio St. 118; Louisiana Nat. Bank v. Laveille, 52 Mo. 380; Robinson v. Memphis & Charleston R. Co., 9 Fed. Rep. 129, 138.

For the rule in Canada, see Erb v. Great Western R. Co., 42 U. C. Q. B. 90, 3 Tupper's App. 446; Oliver v. Great Western R. Co., 28 U. C. C. P. 143; McLean v. Buffalo & Lake Huron R. Co., 23 U. C. Q. B. 448, 24 U. C. Q. B. 271, but the latter case seems to be overruled by that first cited.

There are a few cases which seem to be opposed to the general rule supported by the weight of authority; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; Armour v. Michigan Cent. R., 65 N. Y. 111, 22 Am. Rep. 603; Wichita Sav. Bank v. Atchison, Topeka & Santa Fe R. Co., 20 Kan. 519.

[2] Baltimore & Ohio R. Co. v. Wilkins, 44 Md. 11, 22 Am. Rep, 26; Robinson v. Memphis & Charleston R. Co., 9 Fed Rep. 129.

[3] Adoue v. Seeligson, 54 Tex. 593, 604, per Moore, C. J.; Stone v. Wabash, St. Louis & Pacific R. Co., 9 Bradw. (Ill.) 48.

[4] Pollard v. Vinton, 105 U. S. 7, 13 Rep. 545.

carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

§ 247. **This matter has become the subject of statutory enactments.** Thus in England[1] it is provided that every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment, as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

In Maryland[2] it is provided by statute that all bills of lading shall be conclusive evidence in the hands of any *bona fide* holder for value of such instrument, who shall have become such without actual notice to the contrary, that all of the goods, chattels, and commodities in said instrument mentioned or described, had been actually received by, and were actually in possession and custody of, such person or corporation at the time of issuing the said instrument according to the tenor thereof, and for the purposes and to the effects therein stipulated or provided, notwithstanding that the fact may be otherwise, and that such agent or officer may have had no authority to issue any such instrument on behalf of his said principal, ex-

[1] 18 and 19 Vict., c. 111, § 3. For a case under this act, see Volieri v. Boyland, L. R. 1 C. P. 382. There is a similar statute in Ontario. R. S., c. 116, § 5, sub-section 3.

[2] R. Code 1878, p. 298, §§ 13, 14; 1 Pub. Gen. Laws, p. 118, § 2.

cept for goods, chattels, or commodities actually received, and in possession at the time of such issue.[1]

§ 248. **Neither the master of a vessel nor its shipping agent can bind it or its owner by signing a bill of lading for goods not received.** Such a bill of lading is not only void in the hands of the person to whom it is issued, but also in the hands of a pledgee in good faith and for value.[2] The question is one of agency. The supreme court of the United States upon this point say:[3] "Even if the master had been appointed by the owner, a willful fraud committed by him on a third person by signing false bills of lading would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is because the bill is signed by one not in privity with the owners. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority

[1] In *Missouri* (R. S. 1899, vol. ii, c. 79, §§ 5052–5055) it is provided by statute that no master, owner, or agent of any boat or vessel of any description, forwarder, or officer, or agent of any railroad, transfer, or transportation company, or other person, shall sign or give any bill of lading, receipt, or other voucher or document, for any merchandise or property, by which it shall appear that such merchandise or property has been shipped on board of any boat, vessel, railroad car, or other vehicle, unless the same shall have been actually shipped and put on board, and shall be at the time actually on board or delivered to such boat, vessel, car, or other vehicle, to be carried and conveyed as expressed in such bill of lading, receipt, or other voucher or document. A violation of this provision is punishable by a fine in any sum not exceeding five thousand dollars, or imprisonment in the penitentiary not exceeding five years, or both. The person aggrieved by such violation may also recover in an action at law of the person guilty thereof all damages he has sustained.

There are statutes similar to this in several states, this being given only as a sample.

[2] Pollard v. Vinton, 105 U. S. 7.

[3] Schooner Freeman v. Buckingham, 18 How. 182

with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship when in case of disaster his power of sale arises. But the authority in each case arises out of and depends upon a particular state of facts. It is not an unlimited authority in one case more than in the other; and his act in either case does not bind the owner even in favor of an innocent purchaser, if the facts on which his power depended did not exist; and it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends."

§ 249. **There is no distinction in this respect between a bill of lading given by a carrier on land and one given by a carrier on water.** The exemption of the owner of a ship from liability for the fraud of the master in issuing a false bill of lading does not grow out of the peculiarities of the laws of the sea, and is not founded on the principle that the ship is bound to the freight and the freight to the ship.[1] The exemption of the carrier from liability in such case is founded upon the common law principle, that one is not bound by the acts of an agent when acting outside the scope of his authority. So far as the agency of a master of a ship is implied, it is more comprehensive than that of a station or freight agent of a railroad company;[2] and if any argument is to be drawn from the difference of the agency in the two cases, it is that inasmuch as the master has no authority, actual or apparent, to issue bills of lading until the goods are delivered to the ship, much less has the freight agent of a railroad company, whose agency is less comprehensive, any authority to bind the railroad company by

[1] Robinson v. Memphis & Charleston R. Co., 9 Fed. Rep. 129, 140, per Hammond, J.

[2] Robinson v. Memphis & Charleston R. Co., 9 Fed. Rep. 129, 140, per Hammond, J.

issuing bills of lading for goods not actually delivered to the company. It is not essential, however, that the agent of the carrier, or the master of the vessel, should have actual possession of the goods, if he has potential possession of them, before executing a bill of lading. Thus he may issue a valid bill of lading upon receiving a warehouse receipt for the goods properly issued, as this places the goods within his control.

§ 250. **Neither a general nor a local custom to use bills of lading as collateral security can constitute them negotiable instruments** as against the carrier, and make him liable to the indorsee in the same way that he would be if he had drawn negotiable bills of exchange.

A bill of lading is merely a receipt by the carrier for the merchandise received for transportation and evidence of a contract with the shipper to carry the merchandise to its destination. The carrier's liability would be the same if he received the goods and undertook to transport them without issuing a bill of lading. The carrier's contract is with the shipper and with no one else. If the shipper indorses his contract to any one else, the indorsee acquires only the rights of the shipper, and it is not for the interest of commerce that he should acquire any other rights. The common law makes it no part of the duty of a carrier to issue bills of lading which shall have the effect of negotiable securities as against him; though it holds him rigidly to the performance of his contract as a carrier. While merchants have from time immemorial treated bills of lading as convenient symbols or instruments of title, which they have transferred by indorsement, and have thus given them a *quasi*-negotiability or capacity to pass from hand to hand, this custom of merchants is one wholly for their own benefit, and is one which does not benefit the carrier or in any way concern him, unless it be to make him liable to the indorsee, instead of the shipper, for the delivery of the goods.

Upon this point Judge Hammond, delivering the judgment of the circuit court of the United States in the case of a fraudulent bill of lading which an indorsee had taken as security

for the discount of a draft drawn against it, said:[1] "It seems to me, with all deference, that it is a misapprehension of the true character of this instrument, and of the true relation of the parties to it, to treat it as if the maker were engaged in the business of issuing negotiable securities, which he is bound to protect at all hazards in the hands of a *bona fide* purchaser for value; or, as it is expressed in argument here, to protect those who innocently and in good faith deal with it. This entails a liability *dehors* the contract. It makes the carrier an insurer or guarantor of strangers to the contract against loss incurred by a use of the instrument in which the carrier has no interest, and binds him to a liability for which he is not paid; for the comparatively small sum he receives as compensation for carriage will not, and is never intended to cover or insure him against loss incurred by such a liability as that. The consideration he receives is not commensurate with the liability sought to be imposed, and if it is determined to exist, carriers must necessarily add to the freight a sum sufficient to indemnify them, as insurance companies are; and this for the protection of outside parties dealing in matters not pertaining to the carriage of the goods. Moreover, it obstructs the carrier in his proper business, and entails upon him the selection of agents possessing not only the ordinary mental and moral qualifications essential to the receiving, handling, and carriage of merchandise, but those having the relatively higher qualifications required of bank cashiers or other agents entrusted with the duty of issuing, signing, and handling bank notes, negotiable bonds, or like securities. It does not seem to me in the interest of commerce to compel carriers either to so increase the rates of compensation or to confine them to the selection of agents as banks and trust companies are confined."

§ 251. **The carrier is not estopped to deny that he has received the goods** specified in the bill of lading, when this has been issued by a common agent, such as a station agent,

[1] Robinson v. Memphis & Charleston R. Co., 9 Fed. Rep. 129, 133.

freight receiver, or conductor of a railroad company, without actually receiving the goods, and has passed into the hands of an innocent indorsee for value. Such agent in issuing a fictitious bill of lading is not acting within the scope of his authority, or even within the apparent scope of his authority. He is authorized to receive merchandise for transportation, and to give a receipt for it and a contract for its transportation. "It was not within the apparent scope of this authority to sign and issue documents for the mere purpose of having them attached to drafts or otherwise pledged as collateral security irrespective of the actual possession of goods to be carried. It may well be doubted whether the directory itself, or the body of stockholders even, could authorize the company to issue bills of lading without the merchandise in hand to be used for any purpose. The charter does not authorize such a business, and the company is not engaged in it. Therefore it seems to me plain that the agent's authority, actual and apparent, was limited to issuing bills of lading on goods in hand, and all else was outside the agency, unless we are to treat these documents as against the carrier just as if they were as negotiable in this respect as bills and notes, which we have seen we are not authorized to do."[1]

§ 252. **In New York, however, an exceptional doctrine prevails, that the carrier is estopped to claim that the bill of lading does not cover the goods** described in it. A *bona fide* indorsee of a bill of lading, who has advanced his money upon it, is entitled to rely upon the quantity and kind of goods acknowledged therein, and he may compel the carrier to account for that quantity, whether it was actually shipped or not. The carrier is estopped by signing the bill from settling up his own want of care at the expense of the indorsee who has thus been induced to give credit to the shipment.[2] "There is an established distinction in favor of a *bona fide* indorsee, grounded

[1] Robinson v. Memphis & Charleston R. Co., 9 Fed. Rep. 129, 137, per Hammond, J.

[2] Armour v. Michigan Cent. R., 65 N. Y. 111, 22 Am. Rep. 603.

upon the doctrine of estoppel. By signing the bill of lading, acknowledging the receipt of a given quantity of merchandise, the master has enabled his shipper to go into the market and obtain money on the credit of the shipment, and can not be permitted, as against a person so advancing, to set up his own or the master's want of care at the expense of the indorsee. This results from the qualified negotiability of these instruments.'"[1] A railroad company which has issued a bill of lading for a certain number of barrels of eggs, when in fact the barrels contain nothing but sawdust, is liable to an indorsee of the bill of lading who has advanced money thereon, for the injury sustained through the falsity of the bill of lading.[2] The carrier can always protect himself either by inspecting the packages received so as to know what they contain, or else by issuing bills of lading in such form that an indorsee would not be misled in regard to the quantity or kind of goods thereby covered. If he chooses to issue receipts for barrels or packages containing specified articles, it is not enough to deliver to a *bona fide* indorsee who has advanced money on the faith of the bill of lading, packages containing articles altogether different and of no value.[3]

But the better doctrine is that the carrier is not estopped by any error or misstatement in the bill of lading unless this was within his knowledge or should have been within his knowledge.[4]

§ 253. **A bill of lading may be operative between the pledgor and pledgee, though not binding upon the carrier.** Thus, if a bill of lading is not binding upon the carrier because the goods are not in fact delivered to the carrier, it does not follow that the bill of lading may not operate as a valid transfer as between the person to whom it is issued and his pledgor, if the goods are at the time in the hands of a third person. Moreover, a bill of lading may be operative between the owner of the goods

[1] Meyer v. Peck, 28 N. Y. 590.

[2] Meyer v. Peck, 28 N. Y. 590, 598, per Denio, C. J.

[3] Miller v. Hannibal & St. Joseph R. Co., 24 Hun (N. Y.) 607, 12 N. Y. Weekly Dig. 272.

[4] See this subject in Chapter VII, §§ 314-320.

and his pledgee before the goods are actually received by the carrier. Thus, where a master of a vessel issued a bill of lading of cotton upon receiving an order therefor upon a cotton press which was duly accepted, and the shipper obtained advances upon a draft with the bill of lading annexed, it was held that the bill of lading was effectual to pass the property to the pledgee, as against a creditor of the pledgor who levied an execution upon cotton after such pledge, but before the cotton was delivered from the press to the vessel.[1]

§ 254. **Possession of goods obtained under a spurious bill of lading will not avail against a pledgee of the true bill of lading.** The general owner of goods having obtained advances upon the security of bills of lading representing the goods, has no right to the possession, disposal, or control of the goods, and any possession obtained, or dominion exercised by him, without the pledgee's assent, is tortious and confers no title. Thus genuine bills of lading having been obtained at Chicago, of wheat shipped on board a propeller for Buffalo, and drafts having been discounted on the security of such bills of lading, the general owner afterwards obtained false bills of lading of the wheat as shipped upon certain canal boats at Buffalo, before the wheat had arrived there, although the wheat was afterwards shipped upon the canal boats named in the false bills of lading. Against the latter bills of lading the owner also drew drafts which were paid by the consignees, relying upon the security of these bills. They afterwards obtained possession of the wheat. In an action against them by the holder of the first bill of lading and a draft drawn against it, it was held that the plaintiff was entitled to recover; that not having clothed the general owner with any authority to dispose of the

[1] Adoue v. Seeligson, 54 Tex. 593.

In Pollard v. Vinton, 105 U. S. 7, Miller, J., after stating the general rule that a bill of lading is not a contract upon the carrier unless the goods are actually shipped, added that "in saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they come within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage has commenced, and the evidence of it in the form of a bill of lading is binding."

wheat or to obtain new bills of lading, the latter represented no value, and the plaintiff was not estopped from reclaiming the property.[1]

IV. *Whether Security for Acceptance or Payment.*

§ 255. **The assignment of a bill of lading drawn to the shipper's own order** as security for the discount of a draft drawn against it may be regarded as conclusive of the shipper's intention that the property shall not pass to the drawer except upon his payment or acceptance of the draft.[2] A bill of lading so drawn shows an intent on the part of the shipper to reserve to himself the dominion over the goods shipped; and when he assigns such bill to another as security, his intention is conclusively shown that such assignee shall have a special property in the goods and the full control of them until the draft is accepted or paid; and it is immaterial whether such assignee holds the bill of lading as security for the payment or acceptance of the draft.[3] The intention that such assignment shall confer a special property in the goods arises even when the goods have been shipped in a vessel belonging to the person upon whom the draft is drawn.[4] It is likewise so even if the goods be delivered to the drawer as a mere warehouseman, and not as a purchaser; and a subsequent sale by him to another would confer no title against the holder of the draft or the shipper.

§ 256. **A bill of lading is regarded as security for the acceptance of a time draft** drawn against it rather than as security for the payment of such draft, in the absence of any ex-

[1] Marine Bank v. Fiske, 71 N.Y. 353.

[2] Dows v. National Exch. Bank, 91 U. S. 618; Jenkyns v. Brown, 14 Q. B. 496; Mitchell v. Ede, 11 Ad. & E. N. S. 888; Alderman v. Eastern R. Co., 115 Mass. 233; Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. Rep. 151; Mason v. Great Western R. Co., 31 U. C. Q. B. 73; People's Nat. Bank v. Stewart, 3 Pugs. & Bur. (N. B.) 268.

[3] Hathaway v. Haynes, 124 Mass. 311, 313; Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. Rep. 151.

[4] Turner v. Liverpool Docks, 6 Exch. 543; Schotsmans v. Railway Co., L. R. 2 Ch. App. 336; Ellershaw v. Magniac, 6 Exch. 570.

press stipulation about it. It was urged in behalf of a bank which discounted certain drafts that the bills of lading were taken as security for the principal obligation, namely, the payment of the draft. But the court replied that this is an assumption of the very thing to be proved: to wit, that the transfer of the bills of lading was made to secure the payment of the drafts.[1] "The opposite of this, as we have seen, is to be inferred from the bills of lading and the time drafts drawn against the consignments unexplained by express stipulations. The bank, when discounting the drafts, was bound to know that the drawees on their acceptance were entitled to the cotton, and of course to the evidences of title to it. If so, they knew that the bills of lading could not be a security for the ultimate payment of the drafts. Payment of the drafts by the drawees was no part of the contract when the discounts were made. The bills of exchange were then incomplete. They needed acceptance. They were discounted in the expectation that they would be accepted, and that thus the bank would obtain additional promisors. The whole purpose of the transfers of the bills of lading to the bank may therefore well have been satisfied when the additional names were secured by acceptance, and when the drafts thereby became completed bills of exchange. We have already seen that whether the drafts and accompanying bills of lading evidenced sales on credit on requests for advancements on the cotton consigned, or bailments to be sold on the consignor's account, the drawees were entitled to the possession of the cotton before they could be required to accept; and that if they had declined to accept because possession was denied to them concurrently with their acceptance, the effect would have been to discharge the drawers and indorsers of the drafts. The demand of acceptance, coupled with a claim to retain the bills of lading, would have been an insufficient demand. Surely the purpose of putting the bills of lading into the hands of the bank was to secure the completion of the drafts by obtaining additional names

[1] Dows v. National Exch. Bank, 91 U. S. 618.

upon them, and not to discharge the drawers and indorsers, leaving the bank only a resort to the cotton pledged."

§ 257. **A bank or other agent, to whom a bill of lading with a time draft has been forwarded for collection, may surrender it to the consignee upon his acceptance of the draft,** if the drawer has not expressly directed that the bill of lading shall not be surrendered till the draft is paid.[1] It is immaterial also whether the draft be indorsed "for collection" or not; for these words simply rebut the inference that the indorsee is the owner of the draft. The agent receiving a time draft accompanied by a bill of lading, by the terms of which the property is deliverable to the consignee, is entitled to infer either that the merchandise specified has been sold on credit, in accordance with the terms of the draft, or that the draft is a request for an advance upon a consignment of goods to be sold on account of the shipper. If the transaction be the former, then the consignee, being a purchaser, is entitled in the absence of any express arrangement to the contrary, to the possession of the goods on his accepting the bill.[2] If on the other hand the in-

[1] National Bank of Commerce v. Merchants' Nat. Bank, 91 U. S. 92; Lanfear v. Blossman, 1 La. Ann. 148, 14 Hunt's Merchants' Mag. 264, 45 Am. Dec. 76; Mears v. Waples, 4 Houst. (Del.) 62; affirming 3 Houst. 581; Wisconsin M. & F. Ins. Co. v. Bank of British N. A., 21 U. C. Q. B. 284; affirmed 2 U. C., Error & Appeal, 282; Goodenough v. City Bank, 10 U. C. C. P. 51; Clark v. Bank of Montreal, 13 Grant's (Canada) Ch. 311; Wisconsin Marine & F. Ins. Co. v. Bank of British N. A., 21 U. C. Q. B. 284.

[2] National Bank of Commerce v. Merchants' Nat. Bank, 91 U. S. 92, per Strong, J. "This would not be doubted if, instead of an acceptance, he had given a promissory note for the goods, payable at the expiration of the stipulated credit. In such case it is clear that the vendor could not retain possession of the subject of the sale, after receiving the note for the price. The idea of a sale on credit is that the vendee is to have the thing sold on his assumption to pay and before actual payment. The consideration of the sale is the note. But an acceptor of a bill of exchange stands in the same position as the maker of a promissory note. If he has purchased on credit and is denied possession until he shall make payment, the transaction ceases to be what it was intended, and is converted into a cash sale. Everybody understands that a sale on credit entitles the purchaser to immediate possession of the property sold unless there be a special agreement that it may be retained by

ference to be drawn is that advances are requested upon a consignment of the goods, the consequence is the same. In such case it is plain that the acceptance is asked for on the faith of the consignment, and not on the credit of the drawer. To refuse the consignee the bill of lading would be to withhold from him the very security upon which he is asked to accept the draft. An agent for collection can not be permitted, by declining to surrender the bill of lading on the acceptance of the draft, to disappoint the obvious intentions of the parties, and

the vendor; and such is the well-recognized doctrine of the law. The reason for this is that very often, and with merchants generally, the thing purchased is needed to provide means for the deferred payment of the price. Hence it is justly inferred that the thing is intended to pass at once within the control of the purchaser. It is admitted that a different arrangement may be stipulated for. Even in a credit sale, it may be agreed by the parties that the vendor shall retain the subject until the expiration of the credit, as a security for the payment of the sum stipulated, but if so, the agreement is special, something superadded to an ordinary contract of sale on credit, the existence of which is not to be presumed. Therefore in a case where the drawing of a time draft against a consignment raises the implication that the goods consigned have been sold on credit, the agent to whom the draft to be accepted and the bill of lading to be delivered have been intrusted can not reasonably be required to know, without instruction, that the transaction is not what it purports to be. He has no right to assume and act on the assumption that the vendee's term of credit must expire before he can have the goods, and that he is bound to accept the draft, thus making himself absolutely responsible for the sum named therein, and relying upon the vendor's engagement to deliver at a future time. This would be treating a sale on credit as a mere executory contract to sell at a subsequent date." That the drawee in such a case is not bound to accept the draft except upon surrender to him of the bill of lading, see also *dicta* in Shepherd v. Harrison, L. R. 4 Q. B. 493, per Lord Cockburn, L. R. 5 H. L. 116, 133, per Lord Cairns; Coventry v. Gladstone, L. R. 4 Eq. 493; Gurney v. Behrend, 3 El. & Bl. 622; Schuchardt v. Hall, 36 Md. 590; Marine Bank v. Wright, 48 N. Y. 1; Cayuga Bank v. Daniels, 47 N. Y. 631; Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. Rep. 151. In National Bank of Commerce v. Merchants' National Bank, 91 U. S. 92, after a review of the authorities, Mr. Justice Strong said: "We feel justified in saying, that in our opinion, no respectable case can be found in which it has been decided that when a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft."

deny to the acceptor a substantial right which is assured to him by his contract.

This in brief is the reasoning of the supreme court of the United States in the leading case upon this subject. This reasoning is supported by other rational considerations. "In the absence of special agreement what is the consideration for acceptance of a time draft drawn against merchandise consigned? Is it the merchandise? or is it the promise of the consignor to deliver? If the latter the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, indorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much, after shipment, under the control of the drawer as they were before. Why incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in the case before us, can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment? Meanwhile, though it be a twelvemonth, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices, with no ability to sell till the draft is due? If the consignment be of perishable articles—such as peaches, fish, butter, eggs, etc.,—are they to remain in a warehouse until the term of credit shall expire? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by the indorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold."[1]

§ 258. **But of course it may be expressly agreed that the bill of lading shall secure the payment of a time draft** rather

[1] National Bank of Commerce v. Merchants' Nat. Bank, 91 U. S. 92, 97.

than the acceptance of it. If the holder of a bill of lading as security for a time draft drawn against it be expressly authorized to hold it until the draft be paid, he is, of course, under no legal obligation to surrender the security upon the acceptance of the draft, and to trust to the personal liability of the acceptors for payment; and the drawer in such case is not entitled to require a formal presentment of the bill of exchange for acceptance, and notice of its non-acceptance.[1]

A custom of trade not to deliver the bill of lading till payment of the acceptance, is exceptional.[2] But an agent receiving a time draft and a bill of lading attached, with instructions to hold the goods until payment, has no power prior to such payment, to make a delivery of the goods to the consignee which will divest the ownership of his principal.[3] Thus, if one who had discounted a draft drawn against a bill of lading of wheat, forward the draft with the bill of lading attached, to an agent, with instructions by special indorsement and by letter, to hold the wheat until payment of the draft, the agent has no power prior to such payment, to make a delivery which will divest the ownership of his principal.[4]

§ 259. **Parol evidence is admissible of an agreement made between a shipper and a pledgee** of a time draft with a bill of lading attached, that the bill of lading should not be delivered until the draft should be paid. The indorsement and delivery of the bill of lading do not constitute a written contract having a fixed definite meaning in the law presumably complete in itself, and of a nature to exclude from consideration all express parol agreements as to the conditions annexed to the transfer. The indorsement and delivery of a bill of lading have no such fixed legal effect as flows from the indorsement

[1] Schuchardt v. Hall, 36 Md. 590, 11 Am. Rep. 514; People's Nat. Bank v. Stewart, 3 Pugsley & Bur. (N. B.) 268.

[2] Gurney v. Behrend, 3 El. & Bl. 622, 629; Coventry v. Gladstone, L. R. 4 Eq. 493, 6 Eq. 44.

[3] Dows v. Nat. Exch. Bank, 91 U. S. 618; Stollenwerck v. Thacher, 115 Mass. 224; Gurney v. Behrend, 3 El. & Bl. 622, 632; Pease v. Gloahec, L. R. 1 P. C. 219, 228.

[4] Dows v. Nat. Exch. Bank, 91 U. S. 618.

and delivery of negotiable paper, but operate only as a delivery of the merchandise represented in the bill of lading.[1] If, therefore, a merchant ships goods and takes a bill of lading to his own order, and drawing a bill of exchange payable thirty days after sight, attaches it to the bill of lading and obtains a discount of it at a bank, the transaction legally interpreted does not import a sale of the goods upon credit, or determine that the drawer is entitled to the bill of lading upon his acceptance of the draft without payment; and if the bank surrenders the bill of lading to the consignee upon his acceptance of the draft, and the latter becomes insolvent without paying the draft, the bank must bear the loss, and can not recover of the drawer the amount of the draft.[2]

§ 260. **The title of one who holds a bill of lading for a draft upon the consignee is subject to the condition** that it shall be divested upon the consignee's acceptance or payment of the draft, when the title to the property vests in the latter. Thus, if the draft be a time draft, so that the consignee is entitled to the goods upon acceptance of the draft, the title passes to him upon his acceptance, and the security of the holder of the draft is transferred to the personal liability of the consignee as acceptor; but if he refuses to accept, the title continues unimpaired in the holder of the draft.[3] On the other hand, if the holder of the draft is entitled to retain the bill of lading until the draft is paid, his right of property and possession passes to the consignee only upon the condition of his paying the bill of

[1] Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. Rep. 151.

[2] Security Bank v. Luttgen, 29 Minn. 363, 13 N. W. Rep. 151.

[3] First Nat. Bank v. Kelly, 57 N. Y. 34, 37; Commercial Bank v. Pfeiffer, 108 N. Y. 242, 15 N. E. Rep. 311; Marine Bank v. Wright, 48 N. Y. 1; Cayuga Bank v. Daniels, 47 N. Y. 631; First Nat. Bank v. Crocker, 111 Mass. 163; Allen v. Williams, 12 Pick. (Mass.) 297; First Nat. Bank v. Dearborn, 115 Mass. 219; Hathaway v. Haynes, 124 Mass. 311; Tilden v. Minor, 45 Vt. 196; Petitt v. First Nat. Bank, 4 Bush (Ky.) 334; Richardson v. Nathan, 167 Pa. St. 513, 31 Atl. Rep. 740; Neill v. Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. Rep. 702.

exchange.[1] "It thus appears to be established as a correct rule that a person purchasing a draft drawn by the shipper of the goods, with a bill of lading accompanying it, has a special property in the goods covered by the bill of lading. Usually in the case of a time draft this special property vests in the purchaser of the draft as security for its acceptance. It may be, if so agreed between the shipper and the purchaser of the draft, that the purchaser will have a right to retain the bill of lading, and thus retain his special property in the goods shipped, not only for the acceptance but for the payment of the draft."[2]

V. *How Bills of Lading may be Pledged.*

§ 261. A bill of lading drawn to the order of the consignor is properly assigned by his indorsement. His pledge of it in this way passes to the assignee the title to the goods it represents.[3] But a mere indorsement of it, without a delivery, does not transfer the property in the goods.[4]

The consignor having indorsed and delivered the bill of lading, the carrier is bound to deliver the goods to the person holding this evidence of title, and can not deliver them to any other person without violating his contract and making himself responsible for the loss that the holder of the bill of lading may thereby suffer.[5]

A bill of lading with the name of a particular consignee, or bearer, may be transferred by delivery merely,[6] unless there be a statute imperatively requiring indorsement.

Such an indorsement and delivery transfers a special prop-

[1] Jenkyns v. Brown, 14 Q. B. 496; Hieskell v. Farmers' & Mechanics' Nat. Bank, 89 Pa. St. 155.

[2] Dodge v. Meyer, 61 Cal. 405, 10 Pac. Coast L. J. 169, per Thornton, J.

[3] Tilden v. Minor, 45 Vt. 196; Hieskell v. Farmers' & Mechanics' Nat. Bank, 89 Pa. St. 155; Robinson v. Stuart, 68 Me. 61; Winslow v. Norton, 29 Me. 419, 1 Am. Dec. 601; Bache v. Phillips, 155 Pa. St. 103, 25 Atl. Rep. 891.

[4] Buffington v. Curtis, 15 Mass. 528, 8 Am. Dec. 115.

[5] Forbes v. Boston & Lowell R. Co., 133 Mass. 154.

[6] Allen v. Williams, 12 Pick. (Mass.) 297.

erty in the goods to the holder of the draft drawn against them, both as against the consignor, and as against any creditor of his.[1]

§ 262. **A bill of lading drawn to the shipper's order may be transferred by delivery merely without any indorsement** so as to transfer the property represented thereby.[2] "It is well settled that property or goods shipped by a bill of lading drawn to order, may be transferred by delivery to a third person without any indorsement. Bills of lading are choses in action, and no rule is better established than that instruments of this character may be transferred for a valuable consideration by delivery only. Although the plaintiff was not a party to the bill of lading, it can not affect his right to the contract contained in the same, if he acquired it lawfully."[3] Such a transfer does not, like the delivery of an unindorsed note, transfer a merely equitable title; but it gives as valid and effectual a title to the goods represented by the bill of lading as could be obtained by an actual delivery of the goods themselves, if there was an intent to pass the title by such delivery.[4] Such intent may be shown by the circumstances attending the transaction.[5] The fact that the bill of lading is delivered by the shipper as

[1] Hathaway v. Haynes, 124 Mass. 311; Forbes v. Boston & Lowell R. Co., 133 Mass. 154.

[2] Bank of Rochester v. Jones, 4 N. Y. 497, 54 Am. Dec. 290; Merchants' Bank v. Union R. & Transportation Co., 69 N. Y. 373; Marine Bank v. Wright, 46 Barb. (N. Y.) 45; Michigan Central R. Co. v. Phillips, 60 Ill. 190; Davenport Bank v. Homeyer, 45 Mo. 145, 100 Am. Dec. 363.

[3] Merchants' Bank v. Union R. & Trans. Co., 69 N. Y. 373, per Miller, J.; and see Gibson v. Stevens, 8 How. 384, 400.

[4] Becker v. Hallgarten, 86 N.Y. 167, 175; Glidden v. Lucas, 7 Cal. 26; Allen v. Williams, 12 Pick. (Mass.) 297, 301, per Shaw, C. J.; Holmes v. Bailey, 92 Pa. St. 57; Holmes v. German Security Bank, 87 Pa. St. 525; City Bank v. Rome, W. & O. R. Co., 44 N. Y. 136; St. Louis National Bank v. Ross, 9 Mo. App. 399; Petitt v. First Nat. Bank, 4 Bush (Ky.) 334; Dodge v. Meyer, 61 Cal. 405, 10 Pac. Coast L. J. 169; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Peters v. Elliott, 78 Ill. 321, 326; Davenport Bank v. Homeyer, 45 Mo. 145, 100 Am. Dec. 363; Skilling v. Bollman, 6 Mo. App. 76. See, however, Bissell v. Steel, 67 Pa. St. 443.

[5] Merchants' Bank v. Union R. & Transportation Co., 69 N. Y. 373.

security to one who discounts a draft drawn against it, is well nigh conclusive of the shipper's intention to transfer the property in the goods.[1]

In a case where a bank discounted a draft on the security of a bill of lading, which was delivered to it without indorsement, and the consignee refused to pay the draft, but sold the property and applied the proceeds to an old debt due him from the consignor, it was held that the bill of lading was evidence of an appropriation of the proceeds of sale of the property contained in the bill of lading, whether it was indorsed or not; and that the consignee having notice of the draft and bill of lading before selling the goods, was informed of the appropriation of the proceeds of sale, and could not apply them to an old debt due to himself.[2]

In a recent case in Kentucky a bank had discounted drafts drawn against bills of lading which were deposited with the bank without indorsement or other writing, and without actual delivery of the cotton represented by the bills of lading. The cotton was subsequently attached while *in transitu* by creditors of the shipper. It was held that the bank had a lien upon the cotton paramount to that created by the levy of the attachment.[3]

§ 263. **An informal bill of lading, or one not drawn to order or bearer, may be effectually pledged by delivery** without indorsement. A delivery of any documentary evidence of property with an intent that the transferee shall hold the property in pledge, is a good symbolical delivery of it, so as to vest a special property in the transferee.[4] The policy of the law in

[1] Dows v. Nat. Exch. Bank, 91 U. S. 618; Cayuga Bank v. Daniels, 47 N. Y. 631; Merchants' Bank v. Union R. & Trans. Co., 69 N. Y. 373.

[2] Holmes v. German Security Bank, 87 Pa. St. 525; approved and followed in Holmes v. Bailey, 92 Pa. St. 57.

[3] Petitt v. First Nat. Bank, 4 Bush (Ky.) 334; and see to like effect, Skilling v. Bollman, 6 Mo. App. 76.

[4] Gibson v. Stevens, 8 How. 384; First Nat. Bank v. Crocker, 111 Mass. 163, 169. The court in the latter case say: "We have then in this case an intent of the general owners of the flour to make use of it as a security for an advance of money from the plaintiffs; a delivery of the bill of lading in pursuance of that intent; and a valuable and executed consideration

this matter was well expressed by Chief Justice Eyre in the last century; and this policy certainly should not be less liberal now. He says:[1] "I see no reason why we should not expound the doctrine of transfer very largely upon the agreement of the parties, and upon their intent, to carry the substance of that agreement into execution."

In an Illinois case the railroad shipping receipt delivered in pledge simply acknowledged the receipt of certain goods from the consignor, without naming any consignee, and stated that "this receipt is not transferable." It was contended that the delivery of this receipt without indorsement did not pass any right to the goods in course of transportation, as against a creditor of the consignor who attached the goods in the hands of the railroad company. But the court held that such delivery of the receipt vested in the pledgee a special property in the goods sufficient to maintain replevin against the officer who made the attachment. As to the provision that the receipt was not transferable, the court say:[2] "It is enough to say, that, whatever the reason of this provision, it must have been, for some purpose, in the interest of the railroad company. As the company intended and undertook to carry and deliver the flour to the consignees, the delivery of the shipping receipt to them, or for their benefit, was only to the strengthening of their right to have the delivery of the flour made to them; and it is not perceived how plaintiffs', the consignees', assertion of right to the property, through a delivery of the receipt, should interfere with any interest of the railroad company, or any object of this provision in the shipping receipt. We do not conceive that it has any significance in its bearing upon the rights of the parties in this suit."

In a Massachusetts case it was held that the delivery of a

in the discounting of the draft. The fact that the goods were in the custody of the consignees would not prevent this arrangement from having the effect to transfer the title of consignors to the plaintiffs. Whether it should be regarded as a sale, a pledge or a mortgage, there was a sufficient delivery to give to the plaintiffs a special property, which they could enforce by suit against any wrong-doer."

[1] Haille v. Smith, 1 B. & P. 563, 570.

[2] Peters v. Elliott, 78 Ill. 321, 324, per Sheldon, J.

carrier's receipt not negotiable in form, as security for advances, with the intention to transfer the property in the goods, is a symbolical delivery of the goods themselves, and vests in the person making the advance a special property sufficient to enable him to maintain replevin against an officer who afterwards attaches them as the property of the general owner.[1]

[1] First Nat. Bank of Green Bay v. Dearborn, 115 Mass. 219, 222, 15 Am. Rep. 92. This case is referred to in the subsequent case of Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433, which arose upon a pledge of a warehouse receipt not drawn to order or bearer, which was transferred in pledge by indorsement and delivery. Before any notice of the transfer had been given to the warehouseman, the goods were attached as the property of the general owner. It was held that enough had not been done to give the pledgee a good title as against the attaching creditor. Holmes, J., referring to First Nat. Bank of Green Bay v. Dearborn, said: "In that case the plaintiff discounted Parks & Co.'s draft on Harvey, Scudder & Co. against a railroad receipt, of which the following were the material words: 'Received from R. G. Parks & Co., one hundred barrels of flour consigned to Harvey, Scudder & Co., Boston.' This was delivered to the plaintiff in Wisconsin on the understanding that the property was thereby transferred as security for the advances. Scudder & Co. declined to accept the drafts, and the goods were attached by the defendants. The plaintiff brought replevin, and was held entitled to recover. It will be observed that the document did not run to order, and was not indorsed, so that it could not be argued that the railroad had attorned in advance, and there was no notice to the railroad company, so that it had not made itself the plaintiff's bailee subsequently if ordinary principles were to be applied. It was said, however, that the carrier became the plaintiff's bailee from the time its receipt was delivered. A carrier does stand differently from other bailees in one respect. He has no *delectus personarum*, but is bound to carry for any one who takes proper steps to make him do so. There is, too, the further circumstance that the usual mode of shipping grain is to draw against it and to get a bank to discount the draft. But it may be doubted whether the suggestion was warranted that a carrier would not ordinarily give up the goods except upon a production and surrender of the receipt. Forbes v. Boston & Lowell R., 133 Mass. 154, 158. And so far as the language might seem to imply that the mere passing of the property as between the parties made the carrier bailee for the plaintiff by the general law of bailment, is too broad. But whatever the scope of National Bank v. Dearborn, we can not apply it as a precedent in the present case, so long as Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119, stands."

For the case of Hallgarten v. Oldham, see §§ 298–302. It seems hardly probable that the narrow doctrine of delivery laid down in Lanfear v. Sumner, and followed in Hallgarten v. Oldham, will be adopted elsewhere.

Mr. Justice Ames, delivering the opinion of the court, said: "It is true that a receipt of this kind does not purport on its face to have the *quasi*-negotiable character which is sometimes said to belong to bills of lading in the ordinary form; neither does it purport in terms to be good to the bearer. But independently of any indorsement, or formal transfer in writing, the possession and production of it would be evidence indicating to the carrier that the bank was entitled to demand the property, and that he would be justified in delivering it to them. There are cases in which the delivery of a receipt of this nature, though not indorsed or formally transferred, yet intended as a transfer, has been held to be a good symbolical delivery of the property described in it."

§ 264. **A third person by paying a draft drawn against a bill of lading,** and receiving the latter as security, becomes vested with the title to the goods represented thereby,[1] though the bill of lading be drawn to the consignee's own order, and it be delivered without indorsement to the person paying the draft. And if the carrier delivers the goods without his order to the consignee upon whom the draft was drawn, the delivery is wrongful, and the carrier becomes liable for the goods to the holder of the bill of lading.[2]

§ 265. **One who discounts a draft on the faith of a bill of lading delivered with the draft has such a property in the goods that he can maintain replevin** against an officer who afterwards attaches them upon a suit against the general owner,[3] or against any other person who holds the goods. It is not necessary for this purpose that the plaintiff should be the absolute owner of the property; it is enough that he has a right of property and of possession to secure payment of the

[1] Tiedeman v. Knox, 53 Md. 612.

[2] Joslyn v. Grand Trunk R. Co., 51 Vt. 92; Newcomb v. Boston & Lowell R. Co., 115 Mass. 230.

[3] First National Bank v. Dearborn, 115 Mass. 219, 15 Am. Rep. 92; National Bank v. Bayley, 115 Mass. 228; Gibson v. Stevens, 8 How. 384; Peters v. Elliott, 78 Ill. 321. See, however, Bissell v. Steel, 67 Pa. St. 443.

draft.[1] The right of the shipper is divested by his pledge of the property by delivery of the symbol of it, leaving him only a right in the surplus money which may remain after payment of the draft.[2]

VI. *A Pledgee's Rights as Against the Consignor.*

§ 266. **A bona fide holder of a bill of lading** put into circulation with the consent of the shipper has a title to the goods freed from the equitable rights of the unpaid shipper to stop the goods *in transitu.*[3]

The vendor's right of stoppage *in transitu* is defeated by his indorsement and delivery of a bill of lading of the goods to a *bona fide* indorsee for a valuable consideration, such as a loan of money, without notice of facts on which such right would otherwise exist; for such indorsement and delivery of the bill of lading passes the property to the lender.[4] Thus a purchaser of a shipment of nuts, to be paid for at three months, indorsed the bills of lading as security for a loan made in good faith upon the security. At the time of the application for the loan the borrower was already indebted to the lender, who said he would make the further advance desired, but the borrower must first cover his account. The borrower promised to do this, though he did not name any particular securities, and the lender at once made the further advance. On the subsequent arrival of the ship with the nuts the vendor sought to stop them *in transitu*, the purchaser having stopped payment; but it was held that the pledgee had a good title as against the

[1] Hieskell v. Farmers' and Mechanics' Nat. Bank, 89 Pa. St. 155.

[2] De Wolf v. Gardner, 12 Cush. (Mass.) 19, 24, 59 Am. Dec. 165; National Bank of Chicago v. Bayley, 115 Mass. 228; Dows v. Nat. Exch. Bank, 91 U. S. 618; National Bank v. Merchants' Bank, 91 U. S. 92, 95; Lanfear v. Blossman, 1 La. Ann. 148, 153, 45 Am. Dec. 76.

[3] Lickbarrow v. Mason, 2 T. R. 63, 1 H. Bl. 357, 362, 6 East 21; Barber v. Meyerstein, L. R. 4 H. L. 317; The Mary Ann Guest, Olcott 498; Dows v. Greene, 24 N. Y. 638; Dows v. Rush, 28 Barb. (N. Y.) 157; Rawls v. Deshler, 1 Sheldon (N. Y.) 48; Winne v. McDonald, 39 N. Y. 233; Wait v. Green, 36 N. Y. 556; Western Union R. Co. v. Wagner, 65 Ill. 197.

[4] Becker v. Hallgarten, 86 N. Y. 167.

vendor.[1] This is the general rule, even when the consideration for the indorsement of the bill of lading is an antecedent debt, and in no part arose at the time the bill of lading was handed to the transferee by the lawful holder.[2]

§ 267. **The vendor's right of stoppage in transitu is not discharged absolutely by his indorsement of the bill of lading by way of security or pledge,** but that right must be exercised subject to the charge in favor of such indorsee, who must be paid off before the vendor can assume full control of the goods. After the pledgee has been paid, the vendor stands in exactly the same position as to everybody else, as if there had been no indorsement of the bill of lading by way of security or pledge. The vendor's right of stoppage is not defeated by the pledging of the bill of lading, except as against the pledgee.[3]

[1] Leask v. Scott, 2 Q. B. D. 376.

[2] Leask v. Scott, 2 Q. B. D. 376, dissenting from Rodger v. Comptoir d'Escompte de Paris, L. R. 2 P. C. 393.

Bramwell, L. J., in delivering the judgment of the court, said on this point: "Practically, such a past consideration as is now under discussion has always a present operation. It stays the hand of the creditor. If the plaintiff had agreed on the day the bill of lading was handed to him to give a week's time, there would have been a present consideration. Is it necessary there should be a formal agreement in lieu of that which, whether it would support legal proceedings, as was contended by the plaintiff, or not, was, no doubt, such an understanding that, if the plaintiff had taken proceedings against the borrower the day after he had received the security, he would have committed a breach of faith? * * * If the borrower, in this particular case, had said this bill of lading was coming forward, and he would hand it to the plaintiff, then value would have been obtained by means of the bill of lading; so, if he had said generally that he had securities coming forward, and would deposit them; and what is the difference between a promise with such a statement and a promise without it?"

[3] Kemp v. Falk, L. R. 7 App. Cas. 573; affirming *In re* Westzinthus, 5 B. & Ad. 817; Spalding v. Ruding, 6 Beav. 376; Missouri Pacific R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. Rep. 608.

In Georgia it is provided by statute that a *bona fide* assignee of a bill of lading for a valuable consideration, and without notice that the goods are unpaid for, and the purchaser insolvent, is protected in his title against the seller's right of stoppage *in transitu.*

VII. *A Pledgee's Rights as Against the Consignee.*

§ 268. **A shipper of goods does not lose his title to them by inserting the name of the consignee in a bill of lading of them.**[1] If a time draft be drawn against the bill of lading the consignee acquires the title to the goods only in case he accepts the draft. In the meantime if the draft be discounted on security of the bill of lading the title to the goods vests in the holder of the draft. The assignee of the bill of lading obtains a title to the goods not only as against the consignor but as against the consignee, although the former is indebted to the latter in a sum greater than the value of the goods.[2] Thus the owner of a quantity of flour having consigned it to his factor in another city drew upon the factor against the flour and obtained a discount of the draft upon a delivery of the bill of lading as security. The consignor being already indebted to the factor for previous consignments, the latter refused to accept the draft; but detached and retained the bill of lading, and thereby obtained possession of the flour. In a suit against him by the holder of the draft, he was held liable for a conversion of the flour. He could acquire title to the flour only upon the condition of accepting the draft, and he became a wrong-doer by taking possession of the flour without such acceptance.[3]

Upon the delivery of the bill of lading to the consignee, the title passes to him from the consignor, so that he has no control of the property and his creditors can not seize or attach it.[4]

§ 269. **If a consignee obtains the goods from the carrier without accepting drafts secured by the bills of lading,** and

[1] Bank of Rochester v. Jones, 4 N. Y. 497; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Taylor v. Turner, 87 Ill. 296; First Nat. Bank v. Crocker, 111 Mass. 163; Pratt v. Parkman, 24 Pick. (Mass.) 42; Vallé v. Cerré, 36 Mo. 575; Jenkyns v. Brown, 14 Q. B. 496.

[2] Bank of Rochester v. Jones, 4 N. Y. 497; People's Nat. Bank v. Stewart, 3 Pugs. & Bur. (N. B.) 268.

[3] Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Gibson v. Stevens, 8 How. (U. S.) 384; Conard v. Atlantic Ins. Co., 1 Pet. 386; Means v. Bank of Randall, 146 U. S. 620, 627, 13 S. C. Rep. 186.

[4] Flash v. Schwabacker, 32 La. Ann. 356.

sells the goods, he is liable to the holder of the drafts for the proceeds of the sale. He obtains no title or authority under a bill of lading if he refuses to comply with the terms upon which he is made consignee, namely, the acceptance of payment of the drafts drawn against it. The title to the property and the right of possession are both in the holder of the drafts.[1]

Even if a bill of lading be sent directly to the consignee with a draft upon him attached, or inclosed in the same letter,[2] the consignee can not retain the bill of lading and under it take possession of the goods without accepting the draft.[3] If the consignee retains the bill of lading without accepting the draft he acquires no right of property.[4]

§ 270. **A pledgee may even deliver possession of the goods to the consignee upon whom the draft secured is drawn without losing his security,** if such delivery be made by a special indorsement to the effect that the goods are pledged for the payment of the draft, and are placed in the consignee's custody "in trust for this purpose, and is not to be diverted to any other use until the draft is paid." In such a case the property pledged and delivered was a boat-load of wheat, which on arrival the consignee placed in a warehouse, and afterwards sold and delivered to the purchaser by an order on the warehouseman. The purchaser obtained advances upon the wheat from the warehouseman, who had seen a copy of the bill of lading and of the indorsement thereon. In an action by the pledgee against the warehouseman for a conversion of the wheat it was held that such delivery of the bill of lading did not vest in the consignee a title to the wheat or confer upon him authority to sell it; but simply vested him with the possession to hold in trust for the pledgee, whose title could not be divested by any act of the consignee until he had paid his acceptance.[5]

[1] Allen v. Williams, 12 Pick. (Mass.) 297.

[2] Shepherd v. Harrison, L. R. 5 H. L. 116, 123.

[3] Shepherd v. Harrison, L. R. 5 H. L. 116, 123; Banco de Lima v. Anglo-Peruvian Bank, 8 Ch. D. 160, 171, per V. C. Malins.

[4] Shepherd v. Harrison, L. R. 5 H. L. 116, 123.

[5] Farmers' & Mechanics' Nat. Bank v. Hazeltine, 78 N. Y. 104, 34 Am. Rep.

§ 271. **When a bill of lading has been taken by the consignor, making the goods deliverable to his order,** or to some person designated by him, the inference is that it was not intended that the property should pass to the consignee, except by subsequent order of the person holding the bill. Such intention is almost conclusive, although when there are circumstances indicating an intent to pass the ownership immediately, notwithstanding the bill of lading, or, in other words, where there is anything to rebut the effect of the bill, it is a question for the jury whether the property passed.[1] If, however, there are no circumstances to rebut the intent to retain the ownership exhibited in the bills of lading, and confirmed by the indorsements on the bills, there is no occasion to submit the question to a jury whether there was a change of ownership. A bank discounted a draft drawn upon the consignee of a quantity of turpentine and rosin, bills of lading of which were delivered to the bank as security. The bank forwarded the draft to their agent, with instructions not to deliver the bill of lading until the draft was paid. The consignee accepted the draft, but did not pay it, and it was retained by the agents of the bank. The master of the vessel, however, delivered the goods to the consignee, without his producing the bill of lading. Subsequently the consignee delivered part of the goods to an auctioneer, who made advances upon them without notice that the consignee had not possession of the bill of lading. The auctioneer sold these goods at public auction, and, after deducting their advances and charges, paid the balance to the consignee. After this the bank demanded the goods of the auctioneer, and brought an action of trover for their conversion. It was held that the bank was entitled to recover.[2]

518; following Farmers' & Mechanics' Nat. Bank v. Logan, 74 N. Y. 568; and Farmers' & Mechanics' Nat. Bank v. Atkinson, 74 N. Y. 587; and see Munroe v. Bonanno, 31 Abb. N. C. 1, 28 N. Y. Supp. 375; Carter v. Arguimbau, 31 Abb. N. C. 3; English Bank v. Barr, 31 Abb. N. C. 7.

[1] Dows v. Nat. Exchange Bank, 91 U. S. 618, per Strong, J.; Ogg v. Shuter, L. R. 10 C. P. 159.

[2] People's Nat. Bank v. Stewart, 3 Pugs. & Bur. (N. B.) 268.

A ship which has issued a bill of lading to the consignor's order is bound to deliver the goods to such order, and may be libelled for a misdelivery. Thus, a member of a New York firm having purchased certain cotton, put it on board a steamer for New York, and received a bill of lading which he indorsed to a bank as collateral security for drafts drawn upon the firm and discounted by the bank. Upon the arrival of the vessel in New York the firm demanded the cotton, and obtained it without producing the bill of lading, which was still held by the bank. The drafts not being paid at maturity, the bank, through its cashier, libelled the steamer in admiralty, and obtained a decree, which was affirmed by the supreme court.[1] Mr. Justice Strong said: "By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to deliver it to no one who had not the order of the shipper, and this obligation was disregarded instantly on the arrival of the ship. And it is no excuse for a delivery to the wrong persons that the indorsee of the bills of lading was unknown, if indeed, he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made. Want of notice is excused when a consignee is unknown, or is absent, or can not be found, after diligent search. And if, after inquiry, the consignee or the indorsees of a bill of lading for delivery to order can not be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for, and on account of, the owner. He may thus relieve himself of a carrier's responsibility. He has no right, under any circumstances, to deliver to a stranger." It was claimed that the pledgee delayed in presenting the bills of lading for some weeks until the drafts had fallen due, and had been dishonored. But the court said that this delay could not justify the ship's delivery of the cotton, on the day after its arrival, to persons who had no bill of lading, and no authority whatever to receive it. Had the delay been instru-

[1] The Thames, 14 Wall. 98, 107.

mental in causing the wrongful delivery, a different case might possibly have been presented. But, at most, the laches of the pledgee was mere inaction, and the wrong delivery was in no degree due to it.

§ 272. **An agreement between a consignor and consignee that the proceeds of all shipments shall be applied to the payment of previous advances** made by the latter, has no effect as against one who has in good faith taken a bill of lading from the consignor, as security for the purchase-money of the goods consigned, or for advances obtained by the consignor upon such goods. Thus, where a purchaser of grain agrees with the seller that the latter shall ship the grain in the purchaser's name to his commission merchant for sale, and the purchaser draws drafts upon the commission merchant for part of the price, and delivers the same with the bills of lading of the grain to the seller, the commission merchant acquires no greater interest in it than his consignor had, although the latter is indebted to him, and has agreed that the proceeds of all consignments should be applied to the consignor's credit on account.[1] In such case, the neglect of the original seller of the grain and holder of the bills of lading to notify the consignee of his rights until the latter, having obtained possession of the grain without producing the bills of lading, has sold the grain and applied the proceeds to the consignor's credit on such indebtedness, does not interfere with the seller's right to recover of the consignee in an action for money had and received, the proceeds of the sale of the grain to the extent of the seller's interest in it.[2]

VIII. *A Pledgee's Rights as Against the Carrier.*

§ 273. **If the carrier deliver the goods to any other person than the indorsee and holder of such bill of lading,** he becomes liable to such indorsee and holder for a conversion of the

[1] Taylor v. Turner, 87 Ill. 296.
[2] Taylor v. Turner, 87 Ill. 296.

goods unless he can show some valid excuse. It does not matter that the carrier is ignorant of the fact that the bill of lading is not held by the consignee. One who has discounted a draft drawn against a bill of lading is entitled to rely upon the fact that he holds the bill of lading through the consignor's indorsement, and that, according to the ordinary course of business, the goods can not be obtained from the carrier except upon the surrender of the bill of lading. If the carrier delivers them to the consignee without requiring him to produce it, relying upon his representation that he is the holder of it, he takes upon himself the risk of the truthfulness of this representation, and if deceived is liable to the indorsee of the bill of lading for the value of the goods.[1]

If a bank discounts a draft attached to a bill of lading, but does not notify the carrier of its possession of the bill of lading, and the carrier, without knowledge of its existence, by the direction of the consignee, delivers the goods to another, the carrier is not liable for the goods to the bank.[2]

§ 274. **Where goods have been transferred from one carrier to another** the last carrier is bound to deliver the goods to the holder of the bill of lading issued by the first carrier. This point is illustrated in a recent case in Massachusetts.[3] The indorsee of a bill of lading who had taken it as security for advances upon a bill of exchange attached thereto, brought suit against a railroad company for a conversion of a quantity of grain through a delivery of it to the consignee without requiring him to produce the bill of lading. "By the bill of lading in this case the grain was shipped by a vessel at Chi-

[1] Forbes v. Boston & Lowell R. Co., 133 Mass. 154; Newcomb v. Boston & Lowell R. Co., 115 Mass. 230; Alderman v. Eastern R. Co., 115 Mass. 233; First Nat. Bank v. Northern R., 58 N. H. 203; Winslow v. Vermont & Mass. R. Co., 42 Vt. 700; Merchants' Bank v. Union R. & Trans. Co., 69 N. Y. 373; People's Nat. Bank v. Stewart, 3 Pugs. & Bur. (N. B.) 268; The Thames, 14 Wall. 98; Pollard v. Vinton, 105 U. S. 7; The Vaughan, 14 Wall. 258; Jeffersonville, Madison & Ind. R. Co. v. Irvin, 46 Ind. 180; McEwen v. Railroad Co., 33 Ind. 368.

[2] National Bank v. Philadelphia & Read. R. Co., 163 Pa. St. 467, 30 Atl. Rep. 228.

[3] Forbes v. Fitchburg R. Co., 133 Mass. 154, 159.

cago, deliverable to the order of the consignor at Buffalo. The defendant contends that, upon the arrival of the vessel at Buffalo the bill of lading became *functus officio*. If this were so, it would not affect the result, because the bill of lading was transferred before the vessel arrived at Buffalo. But it is clear that upon the facts agreed the bill of lading remained as the representative of the property, at least until the transit was completed by the arrival at Boston. By the usual course of business in forwarding grain from Chicago to Boston, where the shipment is partly by water and partly by rail, a bill of lading is issued by the vessel at Chicago; the grain is transferred from the vessel to the cars at some intermediate point, usually at Buffalo, and the railroad company issues a receipt similar in form to those issued in this case. This receipt contains a memorandum like the one in this case, 'Ex. Sch. Gallatin,' which indicates that the grain was received from a vessel arriving at Buffalo from Chicago, and that a bill of lading has been issued by that vessel, and is outstanding. The vessel's bill of lading is regarded as transferring the property, and that alone is used in procuring the goods from the carrier. It is clear that in such cases the parties contemplate a continuous transit from Chicago to Boston, and that the bill of lading is regarded as the representative of the grain during the whole of the transit. So far as any question in this case is concerned, the bill of lading has the same effect as if it had been a bill from Chicago to Boston." The railroad was accordingly held liable for the value of the grain, less the freight, storage and other expenses.

In a later case in the same state, the question of freight under similar circumstances was considered, and in an action by a pledgee holding bills of lading issued by a railroad company, for the conversion of the goods by an unauthorized delivery of them to the pledgor, who paid the freight upon them, it was held that the measure of damages is the market value of the goods, less the freight, with interest from the date of the conversion. In both cases it was the duty of the consignee, by virtue of his agreement with the pledgee of the

bills of lading, to pay the freight charges; but it was held that the only interest which the pledgee had in the goods was in their market value, less the freight; that this was not increased by his agreement with the consignee; and that such payment by the consignee, for the purpose of fraudulently obtaining the goods, could not be considered as a payment by the pledgee, so as to entitle him to recover the amount thereof, as a part of the value of the goods wrongfully delivered.[1]

§ 275. **But if the bill of lading makes the goods deliverable to the consignee** and not to the consignor's order, the carrier may be justified in delivering the goods to the consignee without requiring him to produce the bill of lading.[2] The supreme court of Massachusetts so decided in a recent case where it was found that it was the custom of the railroads terminating in Boston to deliver to the consignee goods "billed straight," as it is termed, that is, billed to a particular person, not to order, when they were satisfied of the identity of the consignee, without requiring the production of the bills of lading, and to rely upon the way-bills to determine the consignee and the form of the consignment. It was declared that the holder of the bill of lading who discounted a bill of exchange attached to it, either knew or ought to have known of this custom. Although it does not affect the question of the pledgee's title as against the consignee, it qualifies the carrier's duties as to the delivery of the goods. It justified him in delivering the goods to the consignee, at least at any time before notice that the property had been transferred. Under it there was no laches in not calling for the bill of lading, and in thus delivering there was no violation of any of the terms of its contract, express or implied. Such delivery, therefore, was not a misdelivery which would amount to a conversion, and render the carrier liable to the pledgee for the value of the goods.[3]

[1] Massachusetts Loan & Trust Co. v. Fitchburg R. Co., 143 Mass. 318, 324, 9 N. E. Rep. 669.

[2] Lawrence v. Minturn, 17 How. 100; Sweet v. Barney, 23 N. Y. 335; O'Dougherty v. Railroad Co., 1 Thomp. & C. (N. Y.) 477.

[3] Forbes v. Boston & Lowell R. Co., 133 Mass. 154, per Morton, C. J.

A debtor shipped goods to his creditor on account of advances upon them, and sent an invoice of the shipment with a letter stating that the shipment was made on his indebtedness. He took a bill of lading in his own name which was not forwarded to the consignee. It was held under these circumstances that the delivery to the carrier was equivalent to a delivery to the consignee, and although the consignor retained the bill of lading he had no such interest in the goods as could be subjected to attachment at the suit of a creditor of his.[1]

§ 276. **A complete and valid delivery of goods under a bill of lading** is only made when they come into the hands of the person who has a right to the possession under it.[2] In an English case involving this point, Chief Justice Erle said:[3] "If it were established that a bill of lading—one of the most frequent securities for advances amongst mercantile men—becomes exhausted and extinguished and ceases to be a security when the ship has reached her destination, and the goods which it represents have been landed and warehoused, what a wide door would be opened for fraud. It is scarcely possible to exaggerate the evil consequences which would be likely to result from such a doctrine. There is no authority for it."

§ 277. **The lien of a pledgee of a bill of lading covers freight paid by him on the goods pledged.**[4]

But as against a carrier who has delivered the goods wrongfully to the consignee upon his paying the freight, and falsely representing that he held the bill of lading, the pledgee is not entitled to recover the amount paid for freight in addition to the value of the goods. At the time of the conversion, the goods were subject to a lien for the freight. The only interest which the pledgee had in them was their market value less the freight. The interest was not increased by the fact that the

[1] Straus v. Wessel, 30 Ohio St. 211.

[2] Meyerstein v. Barber, L. R. 2 C. P. 38; Hieskell v. Farmers' & Mechanics' Nat. Bank, 89 Pa. St. 155.

[3] Meyerstein v. Barber, L. R. 2 C. P. 38.

[4] Clark v. Dearborn, 103 Mass. 335.

pledgee and the consignee had agreed, as between themselves, that the latter should pay the freight. The payment by the consignee can not be considered as a payment by the pledgee. It was a payment by the consignee as a part of his scheme of fraud. If the pledgee can recover the full value of the goods and the freight, he is a positive gainer by the fraud, and will receive more than the value of his interest at the time the fraud was committed. Under the circumstances of such a case it has been held that it is just and equitable that the reclamation by the carrier from the consignee, of a part of the proceeds of the fraud, should inure to the benefit of the carrier; and that the plaintiff is entitled to recover a sum equal to the market value of the goods less the freight, with interest thereon from the time of the conversion.[1]

But one who has made advances upon goods pledged to him by indorsement of the bill of lading, in demanding them of one who had contracted to purchase them and had obtained possession of them upon paying the freight and storage, but not in good faith, need not tender the amount of such freight and storage as a condition precedent to receiving the goods. In a suit by such pledgee for a conversion of the goods, the amount so paid would be deducted from the value of the goods in the assessment of damages, only because the payment inured to his benefit, by discharging the goods from a lien to which they were subject, and without the payment of which he could not have obtained possession of the property.[2]

IX. *Rights of Pledgees of Different Parts of the Same Bill of Lading.*

§ 278. **If the several parts of a bill of lading be delivered to different persons,** the property passes by the bill of lading first delivered for a valuable consideration, unless another

[1] Forbes v. Boston & Lowell R. Co., 133 Mass. 154. The text follows in part the language of Morton, C. J., who delivered the decision.

[2] Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137.

has a superior equity.[1] Thus if a bill of lading accompanied by drafts upon the consignee be delivered as security for prior advances, the title vests in him as against a subsequent innocent purchaser for value to whom a duplicate of the bill of lading, or the goods themselves are delivered.[2] And so if the goods before arrival at their destination be reshipped, and a new bill of lading be issued therefor while the original bill of lading is outstanding, and in the hands of one who has taken it as security for advances, the property remains in the latter, although the goods be delivered to the consignee under the new bill of lading. The holder of the original bill of lading may in such case recover the property in an action of replevin, as against the consignee or as against one who has made advances to him upon the goods.[3]

Cotton was shipped in India for London, the master of the vessel signing a bill of lading in three parts. On the arrival of the cotton in London, the consignee having received from the consignor's bankers the three parts of the bill of lading, delivered two of them as security for advances upon the cotton, and afterwards fraudulently deposited the third with another person for another advance. The latter obtained possession of the cotton, whereupon the first pledgee brought an action of trover against him for converting the cotton, and it was held that he was entitled to recover against such second pledgee.[4] Upon the argument the plaintiff claimed that the indorsement to him was by way of pledge, and that it passed to him a sufficient right of property to enable him to maintain this action; and the defendant contended that while his claim was also by way of pledge, he had the better title because he had obtained actual possession of the property. In the court of common pleas, and also in the exchequer chamber, it was

[1] Kent's Comm., 308; Barber v. Meyerstein, L. R. 4 H. L. 317, L. R. 2 C. P. 38, 661; Skilling v. Bollman, 6 Mo. App. 76; The Thames, 14 Wall. 98.

[2] Skilling v. Bollman, 6 Mo. App. 76.

[3] Hieskell v. Farmers' & Mechanics' Nat. Bank, 89 Pa. St. 155.

[4] Meyerstein v. Barber, L. R. 2 C. P. 38, 661, affirmed Barber v. Meyerstein, L. R. 4 H. L. 317, 331.

held that the mere indorsement of the bill of lading was such a delivery of the goods as amounted to a valid pledge, and gave the plaintiff a sufficient property to enable him to maintain the action against the defendant; and this judgment was affirmed by the House of Lords. To the objections urged against this conclusion the Lord Chancellor, giving his opinion in the House, said: "It is said that a frightful amount of fraud may be perpetrated if persons are allowed to deal in this way with bills of lading drawn in sets, if you allow efficacy to be given to the first assignment of one of those bills, to the detriment of persons who may take, for value, subsequent assignments of the others. All we can say is, that such has been the law hitherto, and that the consequences of the supposed evil, whatever they may be, have not been considered to be such as to counterbalance the great advantages and facilities afforded by the transfer of bills of lading. There is no authority or reason for holding that the person who first obtains the assignment of a bill of lading, and has given value for it, shall not acquire the legal ownership of the goods it represents. It seems to be required by the exigencies of mankind. It may be a satisfaction to be told by Mr. Justice Willes (though it is a matter upon which I put no reliance) that other nations concur with us in holding that, whatever inconveniences there may be attending it, the person who gets the first assignment for value is the person to be preferred."

In the same case Lord Westbury, in regard to the obligation of the first pledgee, to give notice of his rights to the wharfinger in charge of the cargo, said: "It was contended at the bar that he had been guilty of laches, because he did not follow up the title he had acquired by giving notice of it to the wharfinger. But that is quite immaterial when a man has got both the right of property and the right of possession, passing, by a symbol, the bill of lading, which is at once both the symbol of the property and the evidence of the right of possession. When his title is thus complete there is no obligation on him to give notice to any one. There was, therefore, no laches on his part, nor was there any ground of complaint that he failed

in ordinary prudence, or that he did not in law and equity complete his security."

§ 279. **But the carrier is justified in delivering the goods to the consignee on his producing one of a set of bills** though there has been a prior indorsement of another part as security for a loan, provided the carrier has no notice or knowledge of such prior indorsement. Thus goods having been shipped for London, the shipmaster signed a set of three bills of lading marked "First," "Second," and "Third," respectively, making the goods deliverable to the consignees, or their assigns, "the one of the bills being accomplished, the others to stand void." During the voyage the consignees indorsed the bill marked "First" to a bank in consideration of a loan. Upon the arrival of the ship in London the goods were placed in the custody of a dock company, to whom the consignee produced the bill of lading marked "Second," and the dock company in good faith and without notice of the bank's claim delivered the goods. It was held by the House of Lords, affirming the decision of the court of appeal, that the dock company had not been guilty of a conversion, and that the bank could not maintain any action against them.[1] Lord Chancellor Selborne, in delivering judgment, said: "Every one claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner. It is for the benefit of the shipper that the right to take delivery of the goods is made assignable, and it is for the benefit and security of the shipowner that when several bills of lading, all of the same tenor and date, are given as to the same goods, it is provided that.

[1] Glyn v. East & West India Dock Co., L. R. 7 App. Cas. 591; and see Shaw v. Foster, L. R. 5 H. L. 321; London and County Banking Co. v. Ratcliffe, 6 App. Cas. 722, 729; Fearon v. Bowers, 1 Sm. L. C., 8th ed., 782.

'the one of these bills being accomplished, the others are to stand void.' It would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment, of which the shipowner has no notice, should prevent a *bona fide* delivery under one of the bills of lading, produced to him by the person named on the face of it as entitled to delivery (in the absence of assignment), from being a discharge to the shipowner. Assignment, being a change of title since the contract, is not to be presumed by the shipowner in the absence of notice, any more than a change of title is to be presumed in any other case when the original party to a contract comes forward and claims its performance, the other party having no notice of anything to displace his right. He has notice, indeed, that an assignment is possible, but he has no notice that it has taken place. There is no proof of any mercantile usage putting the shipowner, in such a case, under an obligation to inquire whether there has in fact been an assignment or not; and, in the absence of such usage, I am of opinion that it is for the assignee to give notice of his title to the shipowner, if he desires to make it secure, and not for the shipowner to make any such inquiry."

CHAPTER VII.

PLEDGES OF WAREHOUSE RECEIPTS.

I. *How Far Warehouse Receipts are Negotiable.*

§ 280. **Warehouse receipts by custom have long been considered as representing the property mentioned in them;** and the assignment or indorsement of such instruments has long been regarded as equivalent to the delivery of such property.[1] The transfer of the certificate transfers to the vendee or pledgee the legal title and constructive possession of the property, and the warehouseman from the time of the transfer becomes his bailee. The delivery of the evidence of title is equivalent to a delivery of the property itself, and it sufficiently manifests the intention of the parties that the title and possession shall pass.[2] Thus, receipts issued by storage and forwarding merchants for

[1] Young v. Lambert, L. R. 3 P. C. 142; M'Neil v. Hill, 1 Woolw. 96; Stewart v. Phœnix Ins. Co., 9 Lea (Tenn.) 104; Horr v. Barker, 8 Cal. 603, 614; Second National Bank v. Walbridge, 19 Ohio St. 419, 2 Am. Rep. 408; Gibson v. Chillicothe Bank, 11 Ohio St. 311; Newcomb v. Cabell, 10 Bush (Ky.) 460; Hanchett v. Buckley, 27 Ill. App. 159; Conrad v. Fisher, 37 Mo. App. 352, 367; Western Union R. Co. v. Wagner, 65 Ill. 197; Burton v. Curyea, 40 Ill. 320, 325, 89 Am. Dec. 350; St. Louis Nat. Bank v. Ross, 9 Mo. App. 399; Fourth Nat. Bank v. St. Louis Cotton Compress Co., 11 Mo. App. 333; First Nat. Bank v. Harkness, 42 W. Va. 156, 168, 24 S. E. Rep. 548, quoting text.

[2] Gibson v. Stevens, 8 How. 384, 400; Yenni v. McNamee, 45 N. Y. 614, per Grover, J.

wool to be forwarded to consignees named, were sent by the owner to the consignees, who, relying upon such receipts, accepted drafts drawn against the wool. The wool was attached while in the hands of the storage merchant as the property of the consignor. But it was held that the delivery of the receipts to the consignees vested the title and the possession of the wool in them, and that the wool was not liable for the consignor's debts, or if so liable, was first subject to the consignee's lien for advances.[1] The delivery of the symbol of the property was as effectual as an actual delivery of the property itself.

Of course the assignee of a warehouse receipt having both title and possession, has the right to maintain an action for the conversion of the property, or for the recovery of it.[2]

Even if the person issuing a receipt for merchandise is not a public warehouseman, the delivery of his receipt is by custom a symbolical delivery of the goods described in it, and the possession of it is equivalent to the possession of such goods so far as they are *in esse* at the time the receipt is given.[3]

§ 280a. **A contract of storage is an essential element of a warehouse receipt.** This receipt can only be issued by persons who pursue the calling of storing goods as a business of profit. The receipt is a written contract between the owner of goods and a warehouseman, whereby the latter is to store the goods and the former is to pay for that service.[4] The contract need not be formally complete, for some of its terms may be implied, but the instrument must in some way show or indicate clearly that a contract of storage has been entered into.[5]

[1] Davis v. Bradley, 28 Vt. 118, 24 Vt. 55, 65 Am. Dec. 226; Bryans v. Nix, 4 M. & W. 775, is a similar case. Also Broadwell v. Howard, 77 Ill. 305.

[2] Harris v. Bradley, 2 Dill. 284; M'Neil v. Hill, 1 Woolworth 96; First Nat. Bank v. Bates, 1 Fed. Rep. 702; Bank of Newport v. Hirsch, 59 Ark. 225, 27 S. W. Rep. 74.

[3] Montgomery v. American Trust & Sav. Bank, 71 Ill. App. 20.

[4] Hale v. Milwaukee Dock Co., 29 Wis. 482, 9 Am. Rep. 603; Shepardson v. Cary, 29 Wis. 34, 42; Bucher v. Commonwealth, 103 Pa. St. 528, 534; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. Rep. 592.

[5] Sinsheimer v. Whitely, 111 Cal. 378, 43 Pac. Rep. 1109; Lowrie v. Salz, 75 Cal. 349, 17 Pac. Rep. 232; Bishop v. Fulkerth, 68 Cal. 607, 10 Pac. Rep. 122.

Weighing tags given by a company that makes no charge for storage, which only show the weight and number of sacks of beans weighed on the company's scales, for the person named therein, are not warehouse receipts, and the transfer of such weighing tags to a pledgee thereof does not transfer possession of the beans, and they may be attached by a creditor of the pledgor.[1]

§ 280b. **Receipts issued by a warehouseman or other person not openly engaged in the storage of goods for hire** are not warehouse receipts which by custom represent the property described therein, and the assignment or indorsement of which is regarded as a delivery of the property itself.[2] The fact that a receipt which is to have the effect of a warehouse receipt was executed by a person or company engaged in the business of storing property for a compensation, must be affirmatively shown by evidence.[3] The delivery of storage certificates representing pig iron by a furnace company engaged in smelting iron ore and making pig iron, and not engaged in storing such iron for others, is not a constructive delivery of the iron described in the certificates to one who has in good faith taken the certificates in pledge.[4]

§ 281. **A warehouse receipt, at common law, is not, in a technical sense, a negotiable instrument,** although the property be made deliverable to "order" or "assigns." The re-

[1] Sinsheimer v. Whitely, 111 Cal. 378, 43 Pac. Rep. 1109; Carthcart v. Snow, 64 Iowa 584, 21 N. W. Rep. 94. In this case the weighmaster's ticket had the word "stored" written upon its face. See, also, First Nat. Bank v. Young, 20 Wash. 337, 55 Pac. Rep. 215.

[2] Bell & Coggeshall Co. v. Kentucky Glass Works Co., 20 Ky. L. Rep. 1089, 48 S. W. Rep. 440; Geilfuss v. Corrigan, 95 Wis. 651, 70 N. W. Rep. 306, 37 L. R. A. 166; Shepardson v. Cary, 29 Wis. 34; Bucher v. Commonwealth, 103 Pa. St. 528; People's Bank v. Gayley, 92 Pa. St. 518; Farmers' & Mechanics' Nat. Bank v. Lang, 87 N. Y. 209; Yenni v. McNamee, 45 N. Y. 614; Union Trust Co. v. Trumbull, 137 Ill. 146, 23 N. E. Rep. 355, 27 N. E. Rep. 24.

[3] Shepardson v. Cary, 29 Wis. 34.

[4] Geilfuss v. Corrigan, 95 Wis. 651, 70 N. W. Rep. 306, 37 L. R. A. 166. That the pledgee acted in good faith does not avail to make a pledge effectual in the absence of a delivery of the property either actual or constructive.

ceipt merely stands in place of the property it represents, and the delivery of it has the same effect in transferring the title to the property as the delivery of the property itself. The delivery of the receipt does not transfer the contract so as to enable the assignee or indorsee to maintain an action upon it in his own name. There is no privity of contract between the warehouseman and the assignee. The assignee occupies no better position, as regards the warehouseman, than his assignor had.[1] Therefore where a warehouseman by mistake issued to the owner at different dates, two receipts for the same property, both of which he assigned as security for loans, and the assignee of the receipt first issued having recovered the property in replevin from the assignee of the other receipt to whom the warehoseman had delivered it, in a suit by the last named assignee against the warehouseman to recover the value of the property, it was held he could show the mistake as a defense to the action.[2] The owner acquired no rights against the warehouseman by virtue of the second receipt, and he could give no rights by an assignment of that receipt.

In another case a warehouse receipt was delivered to a purchaser of the goods, who subsequently, for the purpose of having the goods repacked by the seller, indorsed the receipt in blank and delivered it back to him. The latter thereupon, in contravention of the purpose for which the receipt was delivered to him, pledged it to a bank for a loan; but it was held that although the bank acted in good faith it did not acquire title to the property represented by the receipt, as against the purchaser, who might, notwithstanding such transfer, maintain replevin for the property.[3]

[1] Burton v. Curyea, 40 Ill. 320, 89 Am. Dec. 350; Western Union R. Co. v. Wagner, 65 Ill. 197; Solomon v. Bushnell, 11 Ore. 277, 3 Pac. Rep. 677; Shaw v. Merchants' Nat. Bank, 101 U. S. 557; First Nat. Bank v. Boyce, 78 Ky. 42, 39 Am. Rep. 198; Canadian Bank v. McCrea, 106 Ill. 281.

[2] Second Nat. Bank v. Walbridge, 19 Ohio St. 419, 2 Am. Rep. 408.

[3] Burton v. Curyea, 40 Ill. 320, 332, 89 Am. Dec. 350, Lawrence, J. said: "It is asked what security there is in loaning money upon a pledge of warehouse receipts. We answer, precisely the same security as in loaning upon the pledge and delivery of the property itself. If the person pledging the property is the owner, the security is good to the extent of its value, and

§ 282. **There is a distinction between the quasi-negotiability of such receipts given by custom, and the full and complete negotiability given in some states by statute.** Under such a statute warehouse receipts are, for the purposes of title, as negotiable as promissory notes or bills of exchange. Under all ordinary circumstances there is an imperative presumption of title and power of disposal in the holder. A factor holding such receipts in his own name or as indorsee is conclusively presumed to hold them as owner, with unlimited power of disposal. He can bind his principal, contrary to his instructions, by pledging them, exactly as at common law he might bind his principal by pledging securities negotiable at common law.[1]

§ 283. **In several states warehouse receipts are declared by statute to be negotiable,** and transferable by indorsement in blank or by special indorsement, in the same manner and with like effect as bills of exchange, and with like remedy thereon.[2] Under such statutes negotiability can not be extended beyond the express terms of the provisions of the statutes. Thus warehouse receipts made payable to bearer, and not transferred by indorsement as provided by statute, are not negotiable.[3]

In general it may be said that the negotiability of ware-

so of the warehouse receipts. But if he is not the owner, if he has stolen it, or if he is a bailee merely, and is attempting to make a fraudulent use of the property intrusted to his keeping, a person purchasing or receiving the property as security, does so in subordination to the title of the true owner. These are risks which men engaged in business must be content to encounter, and against which the law can afford them no protection. The law can punish roguery, but it can not secure innocent persons against losses from its multiform devices."

[1] Price v. Wisconsin Marine & Fire Ins. Co., 43 Wis. 267. The cases of Hale v. Milwaukee Dock Co., 29 Wis. 482, 9 Am. Rep. 603, and Shepardson v. Green, 21 Wis. 539, in which expressions to the contrary are criticised. The decision in the latter case was modified in Shepardson v. Cary, 29 Wis. 34.

[2] Newcomb v. Cabell, 10 Bush (Ky.) 460; Central Savings Bank v. Garrison, 2 Mo. App. 58.

[3] Fourth Nat. Bank v. St. Louis Cotton Compress Co., 11 Mo. App. 333.

house receipts as conferred by statute extends only to making them effective to transfer the interests of the holders in the property represented by the receipts.[1] The Missouri, Pennsylvania and Wisconsin statutes in regard to the negotiability of warehouse receipts apply also to bills of lading, and these statutes have already been given in the preceding chapter.[2] The statutes of other states relating exclusively to the negotiability of warehouse receipts are stated in the following sections.

§ 283a. **Alabama.**[3]—The receipt of a warehouseman, on which the words "not negotiable" are not plainly written or stamped, may be transferred by the indorsement thereof, and any person to whom the same is transferred must be deemed and taken to be the owner of the things or property therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person; and the warehouseman must not deliver the things or property therein specified, except on the delivery and cancellation of the receipt; or in case of partial delivery, without an indorsement thereon of such partial delivery; in the event of the loss or destruction of such receipt, the warehouseman, not having notice of the transfer thereof by indorsement, may make delivery of the things or property to the rightful owner thereof; if the things or property, or any part thereof, be claimed or taken from the custody or possession of the warehouseman under legal process, the surrender thereof may be made without the delivery or cancellation of such receipt, or without indorsement thereon.

§ 284. **California.**[4]—Warehouse receipts for property stored shall be of two classes: First, transferable or negotiable; and,

[1] Shaw v. Railroad Co., 101 U. S. 557, 565; Yarwood v. Happy, 18 Wash. 246, 51 Pac. Rep. 461.

[2] *Missouri*, § 237; *Pennsylvania*, § 239.

[3] Code 1896, § 4222. See, as to unauthorized or fraudulent pledge of such receipt, Commercial Bank v. Hurt, 99 Ala. 130, 12 So. Rep. 568; Commercial Bank v. Lee, 99 Ala. 493, 12 So. Rep. 572. As to negotiability, Danforth v. McElroy, 121 Ala. 106, 25 So. Rep. 840.

[4] Codes & Stats. Supp. 1880, § 6855; Act Apr. 1, 1878, § 2; Civ. Code, § 1855; Davis v. Russell, 52 Cal. 611.

second, non-transferable or non-negotiable. Under the first of these classes, all property shall be transferable by the indorsement of the party to whose order such receipt may be issued, and such indorsement of the party shall be deemed a valid transfer of the property represented by such receipt, and may be in blank or to the order of another.

All receipts issued by any warehouseman or other person under this act, other than negotiable, shall have printed across their face in bold, distinct letters, in red ink, the words "non-negotiable."

§ 284a. **Colorado.**[1]—Warehouse receipts for property stored in any public warehouse shall be transferable by the indorsement of the party to whose order such receipt may be issued, and such indorsement shall be deemed a valid transfer of the property represented by such receipt, and may be made either in blank or to the order of another, and the delivery of the receipt so indorsed shall be a valid delivery of the property mentioned therein; provided, however, that all warehouse receipts which shall have the words "not negotiable" plainly written, printed or stamped on the face thereof shall be exempt from the provisions of this section.

§ 285. **Connecticut.**[2]—Warehouse receipts given for any goods, wares, merchandise, grain, flour, produce, or other commodity, stored or deposited with any warehouseman, may be transferred by indorsement thereof, and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the goods, wares, and merchandise therein specified so far as to give validity to any pledge, lien, or transfer, made or created by any such person or persons; but no property shall be delivered except on surrender and cancellation of said original receipt, or the indorsement of such delivery thereon, in case of partial delivery. All warehouse receipts, however, which shall have the words "not ne-

[1] 3 Mills Annot. Stats. 1896, § 4640j.

[2] G. S. 1888, § 3971; **Public Acts,** 1878, c. 40, § 6.

gotiable " plainly written or stamped on the face thereof, shall be exempt from the provisions of this section.

§ 285a. **Delaware.**[1]—Warehouse receipts given for any goods, wares, merchandise, grain, flour, produce, petroleum, or other commodities stored or deposited with any warehouseman, wharfinger or other person in this state, or bills of lading or receipts for the same when in transit by cars or vessels to any such warehouseman, wharfinger or other person, shall be negotiable and may be transferred by indorsement and delivery of said receipt or bill of lading; and any person to whom the said bill of lading or receipt may be transferred shall be deemed and taken to be owner of the goods, wares, merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon; and no property on which such lien may have been created shall be delivered by said warehouseman, wharfinger or other person, except on the surrender and the cancellation of said original receipt or bill of lading, or in case of partial sale or release of the said merchandise by the written consent of the holder of said receipt or bill of lading indorsed thereon; provided, that all warehouse receipts or bills of lading which shall have the words "not negotiable" plainly written or stamped on the face thereof shall be exempt from the provisions of this act.

§ 285b. **Georgia.**[2]—Every warehouseman shall, except as hereinafter provided, give to each person depositing property with him for storage a receipt therefor, which shall be negotiable in form; provided, however, that every such warehouseman shall, upon request of any person depositing property with him for storage, give to such person his non-negotiable receipt therefor, which receipt shall have the words "non-negotiable" plainly written, printed or stamped on the face thereof;

[1] R. Code 1893, p. 530; Laws of Del., vol. 19, ch. 177.

[2] Laws 1899, p. 84, § 4; Citizens' Banking Co. v. Peacock, 103 Ga. 171, 29 S. E. Rep. 752.

and provided, that no assignment of such non-negotiable receipt shall be effective until recorded on the books of the warehouseman issuing it; provided further, that the non-negotiable receipt may be surrendered at any time by the owner thereof and a negotiable receipt issued in lieu of the same.

§ 285c. **Idaho.**[1]—All checks or receipts given by any person operating any warehouse, commission house, forwarding house, mill, wharf or other place of storage for grain, flour, wool or other produce, or commodity stored or deposited, and all bills of lading and transportation receipts of every kind, are hereby declared negotiable, and may be transferred by indorsement of the party to whose order such check or receipt was given or issued, and such indorsement shall be deemed a valid transfer of the commodity represented by such receipt and may be made either in blank or to the order of another.

§ 286. **Illinois.**[2]—Warehouse receipts for property stored in any class of public warehouses, shall be transferable by the indorsement of the party to whose order such receipt may be issued, and such indorsement shall be deemed a valid transfer of the property represented by such receipt, and may be made either in blank or to the order of another. All warehouse receipts for property stored in public warehouses other than those used for storing grain in bulk shall distinctly state on their face the brand or distinguishing marks upon such property.

§ 287. **Indiana.**[3]—All receipts issued by any warehouseman shall be negotiable and transferable by indorsement in blank, or by special indorsement, and with like liability as bills of exchange now are, and with like remedy thereon.

When any warehouse receipt is pledged as collateral se-

[1] Laws 1899, p. 8.

[2] R. S. 1898, c. 114, § 156. See Chicago Dock Co. v. Foster, 48 Ill. 507; Canadian Bank v. McCrea, 106 Ill. 281; Mida v. Geissmann, 17 Ill. App. 207; Hoffman v. Schoyer, 143 Ill. 598, 28 N. E. Rep. 823; Sykes v. The People, 127 Ill. 117, 19 N. E. Rep. 705. This statute has no application to bills of lading. Bankers' Nat. Bank v. Western Union Cold Storage Co., 73 Ill. App. 410.

[3] Acts 1879, p. 232, § 3; Burns' R. S., § 8722.

curity, the pledgee shall have power to sell the same and transfer title thereto, in such manner and on such terms as may be agreed to in writing by the parties at the time of making the pledge.[1]

This statute[2] does not apply to a receipt issued by a private warehouseman for his own property in his own warehouse. Thus a trader being about to purchase a large quantity of apples applied to a bank for a loan, and the bank agreed to make it, provided the trader would convert his storehouse into a public warehouse, by taking out a permit therefor under the statute, and would place the apples therein, and would issue warehouse receipts therefor and have them transferred to the bank as collateral security. This was accordingly done. The trader became bankrupt, and his assignee having taken possession of the apples, it was held that the proceeds belonged to the general estate of the bankrupt. There was nothing to indicate that the bankrupt used his warehouse as a warehouse under the statute in any other way than for the purpose specially intended by the bank; or that the property of any other person than that of the bankrupt was stored in it. The property was not stored "for a consideration," as the statute provided respecting warehouses of the kind for which the permit was procured. The receipt therefore gave the bank no priority of title or claim to the property. The receipt did not amount to a delivery of the property itself.[3]

§ 288. **Iowa.**[4]—All warehouse certificates, or other evidences of the deposit of property issued by any warehouseman, wharf-

[1] Burns' R. S., § 8729.

[2] The statute was enacted March 9, 1875, 1 R. S. 1876, p. 927, Burns' R. S., ch. 110. It divides warehouses into two classes, A & B; the former embracing those for storing grain stored in bulk, and belonging to different owners; and the latter embracing warehouses where property of any kind is stored for a consideration. The permit applied for and issued in this case was for a storehouse of the latter kind.

[3] Adams v. Merchants' Nat. Bank, 2 Fed. Rep. 174, 9 Biss. 396. And see Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. Rep. 592, where the subject is fully considered and the authorities are cited.

[4] Code 1897, § 3129.

inger, or other person engaged in storing property for others shall be, in the hands of the holder thereof, presumptive evidence that the title to the property therein described is in the holder of such instrument.

§ 289. **Kansas.**[1]—All receipts for grain issued by any warehouse shall be negotiable by indorsement in blank, or by special indorsement, in the same manner and to the same extent as bills of exchange and promissory notes.

§ 290. **In Kentucky**[2] warehouse receipts are made negotiable and transferable by indorsement in blank, or by special indorsement, and with like liability, as bills of exchange now are, and with like remedy thereon.

When any receipt or voucher shall have been issued as provided by this article, and used or pledged as collateral security or otherwise for the loan of money, the bank or person to whom the same may be pledged, hypothecated or transferred shall have power and authority to sell the same, and transfer title thereto in such manner and on such terms as may be agreed upon in writing by the parties at the time of making the pledge.[3]

§ 290a. **Louisiana.**[4]—Receipts issued against property stored in public warehouses shall be negotiable and transferable by indorsement in blank or by special indorsement, and delivery in the same manner and to the same extent as bills of exchange and promissory notes now are, without other formality, and the transferee or holder of such public warehouse receipt shall be considered and held as the actual and exclusive owner, to all intents and purposes, of the property therein described, subject only to the lien and privilege of the public warehouseman for storage or other warehouse charges; provided, how-

[1] 1 G. S. 1889, § 1443; 1 G. S. 1897, c. 67, § 11.

[2] Act of March 6, 1869, § 3; G. S. 1899, § 4770. This act is not repugnant to nor embraced in any general law or provision of the general statutes, and is not repealed thereby. Cochran v. Ripy, 13 Bush (Ky.) 495.

[3] Stats. 1899, § 4776.

[4] R. Laws 1897, p. 919, § 7.

ever, all such public warehouse receipts as shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this section; and provided further, that no public warehouseman shall issue warehouse receipts against his own property in his own warehouse, but upon sale of such property in good faith, may issue to the purchaser his public warehouse receipt in form and manner as herein provided, which issue and delivery of the receipt shall be deemed to complete the sale, and shall constitute the purchaser full owner, as aforesaid, of the property therein described.

No cotton-press owner or lessee, wharfinger, or other person shall issue any receipt or other voucher for any goods, wares, merchandise, grain, flour, or other produce or commodity to any person or persons purporting to be the holder, owner or owners thereof, unless such goods, wares, merchandise, grain or other produce or commodity shall have been actually received into store or upon the premises of such cotton-press, wharfinger or other person, and shall be in the store or on the premises aforesaid, or under his control at the time of issuing such receipt.

All warehouse receipts as by this act provided, shall be negotiable by indorsement in blank, or by special indorsement, in the same manner and to the same extent as bills of exchange and promissory notes now are.[1]

The delivery of property on deposit in a warehouse, shall pass by the private assignment of the warehouse receipt, so as to authorize the owner to pledge such property; and such pledge so made, without further formalities, shall be valid as well against third persons as against the pledgers thereof, if made in good faith.[2]

§ 291. **Maine.**[3]—The title to merchandise stored in a public warehouse, or on the wharves and premises of the warehouseman, and in his possession, passes to a purchaser or pledgee,

[1] R. Laws 1897, §§ 2477, 2485, p. 590, § 8.

[2] R. Civ. Code 1900, § 3158.

[3] R. S. 1883, c. 31, § 4.

in good faith, by the indorsement to such purchaser or pledgee, but not in blank, of the warehouseman's receipt therefor signed by the person to whom the receipt was originally given, or by an indorsee of the receipt, and recorded in the books of the warehouseman with whom such goods and chattels are stored.

§ 292. **Massachusetts.**[1]—The title to goods and chattels stored in a public warehouse shall pass to a purchaser or pledgee by the indorsement and delivery to him of the warehouseman's receipt therefor, signed by the person to whom such receipt was originally given, or by an indorsee of such receipt.

§ 293. **Maryland.**[2]—Every acceptance of an order, and every other voucher whatsoever, for any goods, chattels, or commodities, as on storage or deposit, whereby the custody or possession of such goods, chattels, or commodities shall be acknowledged or certified by any warehouseman, wharfinger, or other person or corporation within this state, and which acceptance or voucher shall not on its face provide or stipulate in terms that it shall not be negotiable, shall be held and taken when issued to be a negotiable receipt and instrument to all intents and effects within the meaning and operation of this article.

§ 293a. **Minnesota.**[3]—Warehouse receipts, given for any goods, wares and merchandise, grain, flour, produce or other commodity, stored or deposited with any warehouseman, or other person or corporation in this state, or bills of lading, or receipt for the same, when in transit by cars or vessels to any such warehouseman, or other person, shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading, and any person to whom the said receipt, or

[1] Acts 1878, c. 93, § 1; P. S. 1882, c. 72, § 6.

[2] 1 Pub. Gen. Laws, p. 119, § 3.

[3] 2 G. S. 1894, § 7649. This section does not put bills of lading on the footing of bills of exchange, but merely makes a transfer and delivery of them, in the mode therein prescribed, equivalent, for certain purposes, to a transfer and delivery of the property. National Bank of Commerce v. Chicago, B. & N. R. Co., 44 Minn. 224, 46 N. W. Rep. 342, 560.

bill of lading, may be transferred, shall be deemed and taken to be the owner of the goods, wares or merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon; provided, that all warehouse receipts, or bills of lading, which shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

The title to goods and chattels stored with a storage company or in a public warehouse shall pass to a purchaser, or pledgee, by the indorsement and delivery to him of the storage company's or warehouseman's negotiable receipt therefor, signed by the party to whom such receipt was originally given, or by an indorsee of such receipt, subject to all liens and charges thereon for warehousing, advanced charges and insurance.[1]

§ 293b. **Nebraska.**[2] Warehouse receipts for property stored in any class of public warehouses shall be transferable by the indorsement of the party to whose order such receipt may be issued, and such indorsement shall be deemed a valid transfer of the property represented by such receipt, and may be made either in blank or to the order of another. All warehouse receipts for property other than grain stored in public warehouses shall distinctly state on their face the brand or distinguishing marks upon such property.

§ 293c. **New Jersey.**[3] All warehouse receipts or other vouchers given for any goods, wares, merchandise, provisions, grain, flour or other produce or commodity stored or deposited with any warehouseman, wharfinger, corporation or other person or persons, may be transferred by indorsement or delivery thereof, and any person to whom the same may be transferred shall be deemed and taken to be the owner of the goods, wares and merchandise therein specified without notice, of such

[1] Laws 1895, ch. 149, § 5.
[2] Comp. Stats. 1899, § 5395.
[3] 3 G. S. 1895, p. 3747, § 6.

transfer, or an actual delivery, or change of possession of the goods, wares, merchandise, grain, flour or other produce or commodity named therein, so far as to give validity to any pledge, security, lien or transfer made or created by any person or persons, corporation or corporations; but no property shall be delivered except in surrender and cancellation of said original receipt or the indorsement of such delivery thereon, in case of partial delivery; all warehouse receipts, however, which shall have the words "not negotiable" plainly written, printed or stamped on the face thereof, shall be exempt from the provisions of this section; provided, however, that the person or persons, corporation or corporations, to whom such receipts or vouchers are indorsed and delivered shall be subject to the same conditions as the person or persons, corporation or corporations, to whom the same were originally delivered.

§ 294. **New York.**[1]—Warehouse receipts given for any goods, wares, merchandise, grain, flour, produce or other commodity, stored or deposited with any warehouseman, wharfinger, or other person, may be transferred by indorsement thereof; and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the goods, wares, and merchandise therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person or persons; but no property shall be delivered except on surrender and cancellation of said original receipt, or the indorsement of such delivery thereon in case of partial delivery. All warehouse receipts, however, which shall have the words "not negotiable," plainly written or stamped on the face thereof, shall be exempt from the provisions of this section.

The same provisions are by a later statute made applicable to bills of lading, and to all persons or corporations that shall or may issue bills of lading of any kind or description.

§ 294a. **Oklahoma.**[2]—Warehouse receipts for property stored in warehouses shall be transferable by the indorsement of the

[1] R. S. 1875, p. 230, § 6; R. S., 7th ed., 1882, p. 2260.

[2] Laws 1899, ch. 27, § 19.

party to whose order such receipt may be issued, and such indorsement shall be deemed a valid transfer of the property represented by such receipt, and may be made either in blank or to the order of another.

§ 294b. **Oregon.**[1]—All checks or receipts given by any person operating any warehouse, commission house, forwarding house, mill, wharf, or other place of storage for any grain, flour, pork, beef, wool, or other produce or commodity stored or deposited, and all bills of lading and transportation receipts of every kind, are hereby declared negotiable, and may be transferred by indorsement of the party to whose order such check or receipt was given or issued, and such indorsement shall be deemed a valid transfer of the commodity represented by such receipt, and may be made either in blank or to the order of another.

§ 294c. **South Carolina.**[2]—Every warehouseman shall, except as hereinafter provided, give to each person depositing property with him for storage a receipt therefor, which shall be negotiable in form, and shall describe the property, distinctly stating the brand or distinguishing marks upon it, and if such property is grain the quantity and inspected grade thereof; provided, however, that every warehouseman shall, upon request of any person depositing property with him for storage, give to such person his non-negotiable receipt therefor, which receipt shall have the words "non-negotiable" plainly written, printed or stamped on the face thereof; and provided, that assignment of such non-negotiable receipt shall not be effective until recorded on the books of the warehouseman issuing them. The title to cotton, goods, merchandise and chattels stored in a public warehouse shall pass to a purchaser or pledgee by the indorsement and delivery to him of the warehouseman's receipt therefor, signed by the person to whom such receipt was originally given or by an indorsee of such receipt.

[1] 2 Hill's Annot. Laws 1892, § 4205.

[2] Acts 1896, pp. 207, 208, §§ 4, 5.

§ 294d. **Tennessee.**[1]—All receipts issued by any warehouseman for cotton, tobacco, grain, hemp, whisky, or any kind of produce, wares, merchandise, or any description of personal property, shall be negotiable by written indorsements thereon and delivery, in the same manner and to the same intent as bills of exchange and promissory notes; and any person or persons to whom the same may be transferred *bona fide*, and for value received, shall be deemed and taken to be absolute owner of the produce, wares, merchandise, or other personal property therein specified; and no clause, condition, or limitation, either written or printed, in said receipt shall be held to limit their negotiability or to affect the right of the holder or holders thereof. But all such receipts which shall have the words "not negotiable" plainly written or stamped thereon, shall not be subject to the provisions of this chapter.

§ 294e. **Virginia.**[2]—Warehouse or other storage receipts, with the word "negotiable" plainly written or stamped on the face thereof, issued by any person keeping a licensed warehouse or other licensed place of storage in this state, for goods, wares, merchandise, cotton, grain, flour, tobacco, lumber, iron, or other commodity stored with such person, shall be transferable by indorsement and delivery, whether the property specified in such receipt be owned by the person issuing the same, or another; and any person to whom such receipt is so indorsed and delivered shall be deemed the owner of the property specified therein, so far as may be necessary to give effect to any sale to such person, or to any pledge or lien for his benefit, created or secured by such transfer, whether the receipt and indorsement be admitted to record or not, subject, however, to storage and other charges of the person keeping such place of storage.

§ 294f. **Washington.**[3]—All checks or receipts given by any person operating any warehouse, commission house, forward-

[1] Code 1896, §§ 3605, 3606.

[2] Code 1887, § 1791.

[3] Code 1896, § 2215.

ing house, mill, wharf or other place of storage, for any grain, flour, pork, beef, wool or other produce or commodity, stored or deposited, and all bills of lading, and transportation receipts of every kind, are hereby declared negotiable, and may be transferred by indorsement of the party to whose order such check or receipt was given or issued, and such indorsement shall be deemed a valid transfer of the commodity represented by such receipt, and may be made either in blank or to the order of another.

§ 295. **Wisconsin.**[1]—Every warehouse receipt on which the words "not negotiable" shall not be written or stamped upon the face thereof, shall be deemed negotiable, in like manner as inland bills of exchange according to the custom of merchants. The payees or indorsees of such receipt payable to them or their order, and the holders of every such receipt payable to bearer, may maintain actions thereon in like manner as in cases of inland bills of exchange, and not otherwise.

Any warehouse receipt or bill of lading shall be transferable by delivery thereof without indorsement or assignment, and any person to whom the same is so transferred shall be deemed and taken to be the owner of the property therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person, unless such receipt or bill of lading shall have the words "not negotiable" plainly written or stamped on the face thereof.[2]

§ 296. **A warehouse receipt, though it be made negotiable by statute, stands in lieu of the property.** The holder of a warehouse receipt takes no better title than he would if he held the goods themselves.[3] The negotiability of the receipt serves only to cut off any defense the warehousekeeper may have. "Any other construction would enable any one, fraudulently depositing the goods of another, to pass title, as against the

[1] R. S. 1878, and R. S. 1898, c. 78, §§ 1676, 1678.

[2] R. S. 1898, § 4425.

[3] First Nat. Bank v. Boyce, 78 Ky. 42, 9 Rep. 405, 39 Am. Rep. 198; Greenbaum v. Megibben, 10 Bush (Ky.) 419.

true owner, by obtaining a warehouse receipt in his own name.'"[1]

Where two or more warehouse receipts for the same property have been delivered to different persons, that which was first delivered will prevail.[2]

§ 297. **Whether a warehouse receipt is evidence of ownership or of a pledge** depends not merely upon its terms, but upon the facts of the transaction. Thus, where the owner of an elevator purchased grain for another with money furnished by the latter for that purpose, and after the purchase gave to the person who had advanced the money a warehouse receipt, stating that he had received the grain upon storage, and agreeing to hold the same subject to the order of the holder of the receipt, "for all advances of money on the same," these words were held not to convert the receipt into a mere pledge; but in accordance with the facts of the transaction, the grain was held to be the property of the person who advanced the money for its purchase.[3] The receipt in this form was properly used as a memorandum, or acknowledgment by the warehouseman, that the holders of the receipt had advanced the money with which the grain was purchased. It was competent to show by evidence that the receipt was so used.

And so where a warehouse receipt was given for merchandise to be held subject to the holders' order, "they having a lien thereon for the full cost of the same," it was held that the legal effect of the receipt was to pass to the holders the general property and the right of possession, and not merely a special property. The inference to be drawn from this recital in the receipt was declared to be, either that the property had been purchased and procured by the money of the persons to whom the receipt was given, and so the legal title passed to them in

[1] First Nat. Bank v. Boyce, 78 Ky. 42, 39 Am. Rep. 198, per Hines, J.

[2] Martin v. Creditors, 14 La. Ann. 393; Second Nat. Bank v. Walbridge, 19 Ohio St. 419, 2 Am. Rep. 408; Montgomery v. American Trust & Sav. Bank. 71 Ill. App. 20.

[3] Cool v. Phillips, 66 Ill. 216; also Broadwell v. Howard, 77 Ill. 305.

accordance with their equitable rights; or that they, being the owners of the merchandise, were to retain the general ownership until the warehouseman should pay them the full cost or agreed purchase-price of the same. In either case the warehouseman had not the general property in the goods, and his interest was not subject to levy of execution by any of his creditors.[1]

II. *How they may be Transferred in Pledge.*

§ 298. **A warehouse receipt need not be in a particular form.** An instrument intended simply as a memorandum of the amount of goods on storage, if signed by the warehouseman, has an assignable quality, and an indorsement and delivery of it to one who makes advances upon the faith of it, renders the warehouseman liable to the holder of it for the goods it represents. Thus, a paper which recites that a certain quantity of corn had been received in store for the account of a firm named is a warehouse receipt, and not a mere memorandum, although the words "or order" are not used, nor are any words used to signify that the corn would be delivered on return of the receipt. The indorsement and delivery of such a receipt to a third person for value passes the title to the corn.[2]

An indorsement in blank authorizes the person to whom the goods are sold or pledged to write over such indorsement an assignment of the legal title.[3]

§ 299. **Even the delivery of a warehouse receipt without indorsement,** though it be not written to bearer, if the delivery be with intent to pass the title, is effectual.[4] Thus a ware-

[1] Gibson v. Chillicothe Bank, 11 Ohio St. 311.

[2] Harris v. Bradley, 2 Dill. 284.

[3] Mida v. Geissmann, 17 Ill. App. 207.

[4] Gibson v. Stevens, 8 How. 384; Wilkes v. Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; Conrad v. Fisher, 37 Mo. App. 352, 367; Danforth v. McElroy, 121 Ala. 106, 25 So. Rep. 840; Horr v. Barker, 8 Cal. 609, 613, where the court say, "the delivery of a warehouse receipt without assignment is sufficient, *prima facie*, to pass the title."

In St. Louis Nat. Bank v. Ross, 9 Mo. App. 399, where there had been a pledge of cotton by delivery of the

house receipt delivered without indorsement is a sufficient delivery of the property to sustain a pledge as against subsequent attaching creditors of the pledgor, although the receipt does not make the property deliverable to bearer, but "deliverable only on return of the receipt;" for the mere delivery of the receipt to the pledgee enables him to take control of the property. Any delivery which gives the pledgee the immediate actual control of the property, is sufficent to sustain the pledge.[1]

It has already been noticed that a bill of lading may be effectually pledged by delivery without indorsement.[2] It is well said by the supreme court of California,[3] that "upon principle, reason, and convenience, it is difficult to draw any substantial difference between a bill of lading and a warehouse receipt. If the delivery of the one can pass the title to the prop-

warehouse receipt without indorsement, the court say: "The delivery of the warehouse receipt would be as effectual as the delivery of the cotton itself, and it could make no difference that the warehouse receipt was not indorsed by the pledgor. There is nothing in this at variance with anything decided or said by this court in Erie & Pacific Dispatch v. St. Louis Cotton Compress Co., 6 Mo. App. 172. The transfer of a warehouse receipt not made negotiable by indorsement and delivery can convey to the transferree no greater rights than would be acquired by a transfer of the goods which the receipt represents. That we have said. But it does not follow from this, that one may not pledge cotton by delivering the unindorsed cotton note, as effectually as by delivering to the pledgor the bales themselves."

[1] Whitney v. Tibbits, 17 Wis. 359; Hale v. Milwaukee Dock Co., 29 Wis. 482, 9 Am. Rep. 603.

[2] §§ 261, 262.

[3] Horr v. Barker, 8 Cal. 609, 613. In Davis v. Russell, 52 Cal. 611, 28 Am. Rep. 647, the same court say: "It was held in many cases in the English courts, that an assignment of such a receipt does not amount to a constructive delivery of the goods until the warehouseman is notified thereof, and agrees to hold the goods for the assignee. Benjamin on Sales, § 815. No substantial reason is offered for giving to the assignment of such an instrument an effect differing materially from that of an assignment of a bill of lading." Referring to the case of Horr v. Barker, 8 Cal. 609, the court continue: "The doctrine of that case has not been questioned, so far as we are aware, by the courts of this state. If an assignment of the receipt will transfer the title to the goods, it must necessarily follow that the possession of the receipt, indorsed in blank, is presumptive evidence of the ownership of the goods by the holder of the receipt."

erty described therein, the delivery of the other should have the same effect. There is no substantial difference between the two cases."

§ 300. **Contrary to the general rule that a complete delivery of property represented by a warehouse receipt or bill of lading may be made by merely delivering this document,** though it be not negotiable in form, is a recent decision of the supreme court of Massachusetts.[1] The owner of goods stored at a private warehouse took a receipt whereby the warehouseman promised to deliver them to him, and not to his order, upon the payment of charges. The owner indorsed this receipt in blank and delivered it to a creditor as collateral security. Before the latter had given any notice of the transfer to the warehouseman the goods were attached as the property of the general owner. It was held that there had not been a sufficient delivery of the goods to the pledgee to protect him against the attaching creditor. This decision is based upon the rule laid down in an earlier decision of the court,[2] that an actual delivery of property, that is, a change of possession, is essential to protect a purchaser, as against an attaching creditor. Mr. Justice Holmes, delivering the opinion of the court, said: "The question is then how the transfer of any document can have that effect. The goods are in the hands of a middleman and they remain there. A true change of possession could only be brought to pass by his becoming the servant of the purchaser for the purpose of holding the goods so that his custody should become the possession of his master. But this is not what happens, and it has been held that less would satisfy the law. A carrier or the warehouseman in this case is not the servant of either party *quoad* the possession but a bailee holding in his own name, and asserting a lien for his charges against all parties. He alone has possession of the

[1] Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433. See *contra*, §§ 263, 299, and Conrad v. Fisher, 37 Mo. App. 352, 368. Followed in Gill v. Frank, 12 Ore. 507, 8 Pac. Rep. 764.

[2] Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119.

goods whether the document is transferred or not. But it has been held that the principle of the rule requiring a delivery is satisfied, although the letter of it is not, if the possessor of the goods becomes the purchaser's bailee.[1] Now it is obvious that a custodian can not become the servant of another in respect of his custody except by his own agreement, and *a fortiori* when that custodian does not yield but maintains his own possession, it is clear that his custody can not inure to the benefit of another *as if* it were possession of that other, unless the bailee consents to hold for him subject to his own rights. The only way, therefore, in which a document can be a symbol of the goods in a bailee's hands, for the purpose of delivery to a purchaser is by showing his consent to become the purchaser's bailee. It may or may not be that if a warehouse receipt contains an undertaking to deliver to order, that undertaking is to be regarded as an offer by the warehouseman to any one who will take the receipt on the faith of it, and that it will make him warehouseman for the indorser without more, on ordinary principles of contract.[2] * * * The appeal to commercial usage can not help the plaintiff's case. If there be any usage to treat such documents as this as symbols of property in the sense of the argument for the plaintiffs, it is simply a usage to disregard well settled rules of law affecting the rights of third persons. But we doubt if a prudent merchant would advance

[1] Tuxworth v. Moore, 9 Pick. 347, 20 Am. Dec. 479; Russell v. O'Brien, 127 Mass. 349, 354; Dempsey v. Gardner, 127 Mass. 381, 383, 34 Am. Rep. 389.

[2] "That is the argument of Benjamin on Sales, 2d ed., 676, *et seq.*, criticising Farina v. Home, 16 M. & W. 119, and Blackburn on Sales, 297. But the criticism and the case agree in the assumption that the only way in which the indorsement of a document or title can have the effect of a delivery is by making the custodian bailee for the holder of the document, and that he can not be made so otherwise than by his consent. The necessity for notice in those cases when notice is necessary, stands on the same ground. If the custodian has not assented in advance he must assent subsequently; and the principle is the same whether an express acceptance of a delivery order be required or it is held sufficient if he does not dissent when notified. Boardman v. Spooner, 13 Allen 353, 357, C. J., 90 Am. Dec. 196; instructions of Shaw, C. J., to the jury in Carter v. Willard, 19 Pick. 1, 3; Bentall v. Burn, 3 B. & C. 423." Per Holmes, J.

on the indorsement of a private warehouse receipt not running to order before he had made sure of the warehouseman's assent. We are confirmed in the view which we take by observing that the legislature in dealing with public warehousemen and providing that the "title to goods stored, etc. * * * shall pass to a purchaser or pledgee by the indorsement and delivery to him of the warehouseman's receipt,"[1] as a preliminary to that result expressly requires that the receipt "shall be negotiable in form."

§ 301. **A warehouse receipt which recites that the property therein mentioned is deliverable to bearer,** may be transferred by the owner without indorsement so as to pass the title to the property, if the transfer be made with that intent.[2] A statute which provides that warehouse receipts may be transferred by indorsement does not operate to prevent the passing of title by delivery without indorsement, if the language of the statute be permissive only and not imperative; for the right exists without the statute. The object of such a statute is not to prevent the owner of the property from passing the title in any manner previously effectual for that purpose, but to protect those who deal with persons who are entrusted with such evidences of title only as factors or agents.[3]

Under the statute of Missouri it is held that there must be both indorsement and delivery to confer negotiability upon a warehouse receipt. A warehouse receipt payable to bearer is not negotiable unless indorsed by the owner and delivered. The statute makes such receipt negotiable by indorsement and delivery; not by indorsement without delivery, nor by delivery without indorsement.[4] But it is not to be inferred from

[1] P. S., c. 72, § 6.

[2] Alabama State Bank v. Barnes, 82 Ala. 607, 2 So. Rep. 349.

[3] Rice v. Cutler, 17 Wis. 351, 84 Am. Dec. 747, Alabama State Bank v. Barnes, 82 Ala. 607, 2 So. Rep. 349.

[4] Erie & Pacific Dispatch v. St. Louis Compress Co., 6 Mo. App. 172. It would have been easy for the legislature to say that warehouse receipts should be negotiable in the same manner as bills of exchange, and then the statute would be susceptible of the interpretation sought to be given to it. Per Bakewell, J.

this decision that an effectual pledge of such a receipt can not be made without indorsement; but only that a transfer not made negotiable by indorsement and delivery can convey to the transferee no greater rights than would be acquired by a transfer of the goods which the receipt represents. A pledge by delivery of the receipt unindorsed is as effectual as a pledge by delivery of the goods themselves.[1]

§ 302. **An acknowledgment of notice of the transfer of a warehouse receipt, signed in blank,** by the warehouseman, the name of the transferee being omitted, makes the warehouseman responsible to a pledgee holding the receipt, whose name may afterwards be inserted; and it is immaterial whether the warehouseman had actual knowledge of the person to whom the transfer was made or not.[2]

III. *Rights of a Bona Fide Pledgee.*

§ 303. **A fraudulent purchaser who has obtained a warehouse receipt for the property may give a good title to it,** by transferring the receipt to *bona fide* pledgee before the seller has taken any step to disaffirm the sale on account of the fraud.[3] The transfer of the receipt passes the title as effectually as would the actual handing over the property which is the subject of the receipt.[4] Thus, the owner of a cargo of corn having agreed to sell it, sent the cargo to a warehouse designated by the purchaser to have the corn discharged. The warehouseman made out and delivered a receipt to the purchaser, who immediately pledged it as security for a loan made on the faith of it. The purchaser was insolvent at the time, and failed to pay the price of the corn, and the seller replevied it. It was held that

[1] St. Louis Nat. Bank v. Ross, 9 Mo. App. 399, 411; Fourth Nat. Bank v. St. Louis Cotton Comp. Co., 11 Mo. App. 333.

[2] Central Savings Bank v. Garrison, 2 Mo. App. 58.

[3] Hoffman v. Noble, 6 Met. (Mass.) 68, 39 Am. Dec. 711; Ditson v. Randall, 33 Me. 202; Chicago Dock Co. v. Foster, 48 Ill. 507; Fourth Nat. Bank v. St. Louis Cotton Comp. Co., 11 Mo. App. 333; Amann v. Lowell, 66 Cal. 306, 5 Pac. Rep. 363.

[4] Western Union R. Co. v. Wagner, 65 Ill. 197; Burton v. Curyea, 40 Ill. 320, 89 Am. Dec. 350.

the buyer's possession of the receipt was equivalent to his possession of the corn, and that the pledgee having, in good faith, made advances on the receipt, he was entitled to protection. The seller claimed that the warehouseman should have sent the receipt to him, instead of giving it to the buyer; but it was held, under the circumstances of the case, that, inasmuch as the seller had not informed the warehouseman of his claim to hold the corn until it was paid for, the latter was not bound to protect the seller.[2] But, even if the warehouseman had been chargeable with omission or mistake in delivering the receipt to the purchaser, the latter, having the apparent title and right of possession, could effectually pledge the property, and the seller would be left to his remedy against the warehouseman.

§ 304. **A fraudulent or felonious transfer of a warehouse receipt passes no title as against the true owner.**[3] There is an obvious distinction between cases where goods or non-negotiable securities have been obtained by fraud and felony against the will of the owner, and cases where the owner has voluntarily, although induced by false pretenses or representations, delivered possession. In the one case, the owner has no intention of parting with his property, in the other he has.[4] In the one case, the property having been feloniously taken from the owner, no title passes from him; but in the other, the owner having voluntarily invested another with the power of disposal, he is estopped as against an innocent third person, dealing upon the faith of such power, from claiming title him-

[1] Hoyt v. Baker, 15 Abb. Pr. (N.Y.) N.S. 405; McCombie v. Spader, 1 Hun (N. Y.) 193; Paddon v. Taylor, 44 N.Y. 371.

[2] Hoyt v. Baker, 15 Abb. Pr. (N.Y.) N. S. 405; Hazard v. Abel, 15 Abb. Pr. (N.Y.) N. S. 413.

[3] Commercial Bank v. Hurt, 99 Ala. 130, 12 So. Rep. 568; Commercial Bank v. Lee, 99 Ala. 493, 12 So. Rep. 572; Soltau v. Gerdau, 119 N. Y. 380, 23 N.E. Rep. 864, 16 Am. St. Rep. 843; Hentz v. Miller, 94 N.Y. 64; Collins v. Ralli, 85 N. Y. 637, affirming 20 Hun 246; Howland v. Woodruff, 60 N.Y. 73.

[4] White v. Garden, 10 C. B. 919.

§ 294d. **Tennessee.**[1]—All receipts issued by any warehouseman for cotton, tobacco, grain, hemp, whisky, or any kind of produce, wares, merchandise, or any description of personal property, shall be negotiable by written indorsements thereon and delivery, in the same manner and to the same intent as bills of exchange and promissory notes; and any person or persons to whom the same may be transferred *bona fide*, and for value received, shall be deemed and taken to be absolute owner of the produce, wares, merchandise, or other personal property therein specified; and no clause, condition, or limitation, either written or printed, in said receipt shall be held to limit their negotiability or to affect the right of the holder or holders thereof. But all such receipts which shall have the words "not negotiable" plainly written or stamped thereon, shall not be subject to the provisions of this chapter.

§ 294e. **Virginia.**[2]—Warehouse or other storage receipts, with the word "negotiable" plainly written or stamped on the face thereof, issued by any person keeping a licensed warehouse or other licensed place of storage in this state, for goods, wares, merchandise, cotton, grain, flour, tobacco, lumber, iron, or other commodity stored with such person, shall be transferable by indorsement and delivery, whether the property specified in such receipt be owned by the person issuing the same, or another; and any person to whom such receipt is so indorsed and delivered shall be deemed the owner of the property specified therein, so far as may be necessary to give effect to any sale to such person, or to any pledge or lien for his benefit, created or secured by such transfer, whether the receipt and indorsement be admitted to record or not, subject, however, to storage and other charges of the person keeping such place of storage.

§ 294f. **Washington.**[3]—All checks or receipts given by any person operating any warehouse, commission house, forward-

[1] Code 1896, §§ 3605, 3606.
[2] Code 1887, § 1791.
[3] Code 1896, § 2215.

ing house, mill, wharf or other place of storage, for any grain, flour, pork, beef, wool or other produce or commodity, stored or deposited, and all bills of lading, and transportation receipts of every kind, are hereby declared negotiable, and may be transferred by indorsement of the party to whose order such check or receipt was given or issued, and such indorsement shall be deemed a valid transfer of the commodity represented by such receipt, and may be made either in blank or to the order of another.

§ 295. **Wisconsin.**[1]—Every warehouse receipt on which the words "not negotiable" shall not be written or stamped upon the face thereof, shall be deemed negotiable, in like manner as inland bills of exchange according to the custom of merchants. The payees or indorsees of such receipt payable to them or their order, and the holders of every such receipt payable to bearer, may maintain actions thereon in like manner as in cases of inland bills of exchange, and not otherwise.

Any warehouse receipt or bill of lading shall be transferable by delivery thereof without indorsement or assignment, and any person to whom the same is so transferred shall be deemed and taken to be the owner of the property therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person, unless such receipt or bill of lading shall have the words "not negotiable" plainly written or stamped on the face thereof.[2]

§ 296. **A warehouse receipt, though it be made negotiable by statute, stands in lieu of the property.** The holder of a warehouse receipt takes no better title than he would if he held the goods themselves.[3] The negotiability of the receipt serves only to cut off any defense the warehousekeeper may have. "Any other construction would enable any one, fraudulently depositing the goods of another, to pass title, as against the

[1] R. S. 1878, and R. S. 1898, c. 78, §§ 1676, 1678.

[2] R. S. 1898, § 4425.

[3] First Nat. Bank v. Boyce, 78 Ky. 42, 9 Rep. 405, 39 Am. Rep. 198; Greenbaum v. Megibben, 10 Bush (Ky.) 419.

of the flour *bona fide* the transfer to him was valid, and the plaintiff had no property which would entitle him to recover.[1]

§ 306. **An innocent pledgee of a warehouse receipt takes a title superior to the lien of a vendor who permits the receipt to pass into the hands of the vendee,** in such a way as to enable him to pledge it.[2] A dealer in cotton was in the habit of selling cotton to a cotton buyer under an arrangement which was intended to insure the seller payment for the cotton, before he should part with possession of it. This arrangement was that when the purchaser was ready to ship a parcel of cotton the seller should deliver the cotton notes, which represented the cotton in a warehouse, to the agent of a freight line, who thereupon was to give a receipt for the cotton notes, declaring that bills of lading should be issued on return of the receipts. The purchaser was then to pay the purchase-money for the cotton before the seller should part with the carrier's receipts. This course of dealing was continued for some time, but the carrier disregarded one feature of it, by delivering the bills of lading to the purchaser without requiring a surrender of the receipts given to the seller for the cotton notes. Finally the seller delivered to the agent of the freight line, certain cotton notes representing cotton sold to this purchaser, and took the agent's receipt therefor in the usual form. The purchaser took these cotton notes and substituted them at a bank for certain other cotton notes, upon which the bank had made advances as collateral security. The purchaser immediately afterwards failed and absconded. The seller of the cotton thereupon took possession of the cotton sold, which was still in the warehouse, and thereupon the bank which had taken it in pledge brought a writ of replevin to recover possession of it, and it was held to be entitled to recover.[3] Bakewell, J.,

[1] Babcock v. Lawson, 5 Q. B. D. 284, 42 L. T. Rep. N. S. 289.

[2] The vendor's lien is not affected unless the warehouse receipt is negotiable. Vogelsang v. Fisher, 128 Mo. 386, 31 S. W. Rep. 13. See, also, People's Sav. Bank v. Bates, 120 U. S. 556, 564, 7 S. C. Rep. 679.

[3] Fourth Nat. Bank v. St. Louis Cotton Compress Co., 11 Mo. App. 383, 342.

delivering the opinion of the court, said: "A sale and delivery of a chattel, so far as a *bona fide* purchaser from the first vendee is concerned, without any notice of reserved claims or rights on the property, ought to be sufficient for his protection. The general rule, of course, is that where the vendor surrenders to the vendee, or to the agent of the vendee, the possession of the subject-matter of the sale, whether by a manual and actual, or by a symbolical delivery, the lien is defeated, provided that the vendor does entirely and voluntarily resign possession of the goods. But there are cases in which the vendor, as between vendor and vendee, may retain a lien which he will not be entitled to as against interests of third persons which may intervene. By delivering the warehouse receipts to the freight line, the vendor in the present case seems to have changed the control and dominion of the property, and he put it in the power of the vendee to do what he actually did, that is, to take the symbol of the property, which, so far as the rights of third persons are concerned, was the property itself, and to pledge it for value, under such circumstances as would naturally lead the most vigilant to believe that the property was his own to sell or pledge; we do not see, therefore, how it can be said that, as to third persons, as the plaintiff in this case, the vendor retained his lien."

§ 307. **An order upon a warehouseman** accepted by him is a sufficient delivery of goods in pledge to the holder of the order.[1] The words "value received" contained in such order are sufficient notice to the warehouseman of such lien, and a fraudulent representation to him by the owner of the goods, made without the pledgee's knowledge that the lien of the pledge had been extinguished, would not affect his rights.[2]

§ 308. **Title by estoppel.** In the foregoing sections it has been shown that one who advances money to another upon his

[1] Jones v. Baldwin, 12 Pick. (Mass.) 316; Frazer v. Hilliard, 2 Strobh. (S. C.) 309.

[2] Jones v. Baldwin, 12 Pick. (Mass.) 316.

presentation of a warehouse receipt, stands in the position of a purchaser for value of the property therein described; and that he can hold the property, even as against the real owner, who has invested the pledgor with an apparent title, because the pledgee has parted with value on the faith of that title. There is another class of cases where the pledgee does not stand in this position, but has parted with his money on the promise of the borrower to pledge property to which he is about to acquire title, and yet may claim the goods as against the owner because the latter has by his acts or statements induced him to repose upon the security he has received, and to refrain from any attempt to recover his money or to obtain other security. The owner is in such cases estopped by his acts or declarations from claiming the property, as against one whose position has been altered by relying on the evidence of title with which the owner invested the pledgor after the loan was made.

This point is illustrated in the following case: The owner of a quantity of cotton, in store, contracted to sell it upon the terms that payment should be made upon delivery. The purchaser, before obtaining possession of the cotton, borrowed a sum of money of a banking company, giving as security an invoice and written pledge of the cotton, and an order upon the warehouseman. The warehouseman, with the owner's consent, also delivered a warehouse receipt to the purchaser. This loan was on Saturday. On Tuesday following the pledgor failed without having paid for the cotton. In an action by the original owner to recover possession of the cotton, it was held, that although upon the occasion of the loan the banking company acquired no title to the cotton as against the original owner, inasmuch as it parted with its money solely upon the engagement of the borrower, and upon his order, and although the company acquired no title at the time of the delivery of the warehouse receipt, because it parted with no value upon the faith of it, yet, that upon receiving the receipt, the company had a right to repose upon it, as a ratification of the prior pledge; and that having relied upon it, and thereby having been induced to refrain from any attempt to recover the loan

or to obtain security for it, the original owner was estopped from claiming title.[1] The rule prevails in such a case, that where one of two innocent persons must suffer by the fraud or wrongful act of another, the loss shall fall upon him by whose act or neglect the fraud or wrongful act has become possible. The original owner gave credit to the purchaser and enabled him to deal with the cotton as his own, by investing him with the possession and the *indicia* of ownership. The banking company risked their money upon the faith of the promise of the purchaser to procure and deliver the warehouse receipt for the property; but upon the receipt of that they had a right to repose upon it as evidence of the purchaser's title, and a ratification of the prior pledge of the cotton for the loan; and the original owner, having consented to the issuance of the receipt by the warehouse, must be held to have assented to the transfer or other use of it by the purchaser, and thaf faith should be given to it as to like instruments. Had the company not obtained the warehouse receipt, they might have resorted to some process for the recovery of their loan or other indemnity against loss.[2]

§ 309. **Two things must concur to create an estoppel by which an owner may be deprived of his property,** by the act of a third person, without his assent, under the rule now considered: 1. The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and, 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels *in pais*. The elements of an estoppel are thus stated by Judge Allen, of the Court of Appeals of New York, in a case which differed from the principal case stated in the foregoing section in that the

[1] Voorhis v. Olmstead, 66 N.Y. 113, affirming 3 Hun 744. See Knights v. Wiffen, L. R. 5 Q. B. 660.

[2] Voorhis v. Olmstead, 66 N.Y. 113, per Allen, J., substantially in his language.

person who assumed to dispose of the property in controversy had neither the possession nor the right of possession of the property, nor any documentary evidence of title, or any *indicia* of ownership, or of dominion over the property of any kind.[1] In further elucidation of the principle which distinguishes the one case from the other, Judge Allen says: "There is a manifest equity in holding the owner of property estopped from asserting title as against one who, for value actually paid, has purchased it from one having, by the voluntary act or negligence of the owner, the apparent title with right of disposal; but with this limitation there is no hardship in holding to the rule that the right of property in chattels can not be transferred unless on the ground of authority or title. Public policy requires that purchasers of property should be vigilant and cautious at least to the extent of seeing that their vendors have some and the usual evidence of title, and if they are content to rest upon their declarations, they may not impose the loss which is the result of their own incautiousness or credulity on another. The payment for, or parting with value for, the goods by the purchaser from the fraudulent vendee, lies at the foundation of the estoppel, for, if he has parted with nothing, he can lose nothing by the retaking of the goods by the original owner, and that payment must be occasioned by the acts or omissions of such owner. It is the payment that creates the estoppel, and if that is not made in reliance on the acts of the owner, the latter is not and can not, in the nature of things, be estopped."

§ 310. **An estoppel arises against a warehouseman by reason of a false representation** that the property mentioned in a receipt is in store when it is not, so that he will be liable for advances made upon the property upon the faith of such representation.[2]

§ 311. **A warehouseman is estopped as against an assignee of his receipt, to deny that he has the identical goods** men-

[1] Barnard v. Campbell, 55 N. Y. 456, 463.

[2] Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380.

tioned in the receipt. "The stipulation upon the face of the receipt that the articles mentioned will be delivered only upon the return of the receipt, is a contract upon which the assignee has a right to rely, upon the faith of which he has acted, and for the breach of which he has his action against the warehouseman. It is, therefore, as between the makers of the receipt and an assignee who has in good faith taken it as security for money advanced, not simply a receipt subject to be explained and contradicted by parol proof, but a contract, and subject to the rules applicable to other contracts. This is not upon the ground that they are negotiable strictly, but they are *sui generis*, and stand upon grounds applicable to that class of paper."[1] Therefore, where a warehouseman gave a receipt for forty bales of cotton, guaranteeing a valuation of fifteen hundred dollars, he then having on hand more than a hundred bales belonging to the owner, it was held that he could not show by parol evidence that it was agreed at the time the receipt was given that he could hold the forty bales then in his warehouse, or any other forty bales that might afterwards come in, of the value stipulated, subject to the receipt. The parol proof offered in this case contradicts the writing, and is therefore not admissible.[1] "The transfer of the warehouse receipt," say the court, "had the effect of an actual delivery of the cotton to the assignee to be held as a pledge, and therefore the identical cotton should be designated, and it appearing that defendants had a large number of bales on hand, and the receipt not distinguishing the forty mentioned from the others, parol proof would have been admissible for this purpose, that is, to designate the sales actually embraced in the receipt. But it does not follow that parol proof is therefore admissible for all purposes. In other words, the ambiguity or uncertainty arising upon the proof as to the identical bales embraced in the receipt, may be met or removed by parol testimony, but this does not open the door for the admission of

[1] Stewart v. Phœnix Ins. Co., 9 Lea (Tenn.) 104, 111.

[2] Stewart v. Phœnix Insurance Co., 9 Lea (Tenn.) 104, 111.

parol proof generally, or for any other purpose. We need not inquire in this case whether the parol proof would have been sufficient to designate the particular cotton; it is probable the defendants would in any event have been liable for the value. They, as we have seen, would have been estopped as against an assignee of the receipts to deny that they had the cotton, and their inability to show that any particular bales were agreed upon to be included in the receipt, would probably be no defense for them."

§ 311a. **Where warehouse receipts were issued, providing that the property described therein should be delivered only on return of the certificates properly indorsed,** and the warehouseman delivered the property without the return of the warehouse receipts, he was liable to an indorsee of the warehouse receipts who in good faith loaned money upon them. He will not be heard to dispute the indorsee's title, nor to aver that he did not receive the property on the terms specified in the receipts. The receipts in such case represent as true two very essential things: 1. That the warehouseman received the property mentioned in the receipts as warehouseman. 2. That the property will be delivered only on the return of the certificates, properly indorsed. The warehouseman and not an innocent third party who has relied on his representations must bear the loss.[1]

§ 312. **But a warehouseman is not estopped to deny statements in his receipt which are not within his knowledge,** and of the truth of which he should not be required to have knowledge. Thus if he receives wheat upon storage, and describes it in his receipt as "No. 2 wheat," an assignee of the

[1] Babcock v. People's Savings Bank, 118 Ind. 212, 20 N. E. Rep. 732; Planters' Rice Mill Co. v. Merchants' Nat. Bank, 78 Ga. 574, 3 S. E. Rep. 327; M'Neil v. Hill, 1 Wool. 96; First National Bank v. Bates, 1 Fed. Rep. 702; Whitlock v. Hay, 58 N. Y. 484; Stewart v. Phœnix Ins. Co., 9 Lea 104; Quick v. Milligan, 108 Ind. 419, 9 N. E. Rep. 392; Preston v. Witherspoon, 109 Ind. 457, 9 N. E. Rep. 585; Cowdrey v. Vandenburgh, 101 U. S. 572.

receipt can only be required to deliver him the identical wheat received, though this be of a quality inferior to that stated in the certificate, and though the assignee received the certificate with no knowledge of the quality of the wheat except that derived from this statement. The warehouseman is not estopped by this statement.[1]

And so a warehouse receipt for a number of barrels of mess pork only binds the warehouseman, in the absence of fraud or willful or negligent misrepresentation on his part in respect to the description of the property, to deliver the same barrels and the contents thereof; and although the barrels in fact do not contain mess pork, but salt, the warehouseman is not liable to a pledgee who has advanced money relying upon the receipt as security.[2]

§ 313. A warehouseman who issues a receipt by mistake and not intentionally, is not estopped to dispute the receipt, though

[1] Robson v. Swart, 14 Minn. 371, 100 Am. Dec. 238. See §§ 248–252.

[2] Hale v. Milwaukee Dock Co., 29 Wis. 482, 488, 9 Am. Rep. 603.

"The words 'mess pork' in this receipt, are clearly words of description. They are descriptive of the barrels received, and inserted for the purpose of identification. They signify no more in that connection than that the fifty-four barrels received and which are to be delivered to the bearer on return of the receipt and payment of storage, are described, marked or known as barrels of mess pork. They do not signify that the barrels actually contain that article to the knowledge of the warehouseman, or that he so states or represents to any person purchasing the property by taking delivery of the receipt. Neither do they signify that he has any actual knowledge or information upon the subject, or that he so states or represents, except so far as the barrels themselves, by their external appearance, size, weight, marks, etc., indicate such to be their contents. He receipts them upon the representation of the bailor, and their external appearance corresponding therewith as to contents. He does not, and is not supposed to have any actual knowledge of their contents, and the language of the receipt is not so to be understood. It is no warranty on his part as to the actual contents, but only that the barrels are so represented and so appear to him, to the extent of his knowledge or means of information on the subject; and as they are represented and appear to him, so he represents or describes them to others in his receipt. A warehouseman, like a common carrier, is not authorized to open and inspect barrels or packages delivered to him for safe keeping. A carrier can not do this, or insist on its being done, before signing the receipt or bill of lading; and the usages and course of the business with warehousemen are the same." Per Dixon, C. J.

this has been taken from the holder by a pledgee as security for a loan, in the belief that its representations are true.[1] The estoppel which creates responsibility for a false receipt arises not from the instrument itself, which has not the qualities of negotiable paper, but from the acts and conduct of the party issuing the receipt wholly aside from the instrument itself. "The receipt of a warehouseman or wharfinger, and the receipt or bill of lading of a common carrier, are contracts of precisely the same general nature and effect, and should obviously be governed by the same rules and principles as to the application of the doctrine of estoppel or negotiability, which, with respect to such contracts, mean one and the same thing. They are or may be said to be negotiable or conclusive, in the hands of a *bona fide* assignee or holder for value, so far as the party executing them, warehouseman or carrier, has made or is bound by the representations contained in them. They are negotiable or conclusive and valid in the hands of such a holder, because the signer, or party by whom they are executed, is estopped, or not permitted to deny the existence of the facts represented in or by them, and which are presumed to have been within his knowledge at the time of their execution. Negotiability or *quasi*-negotiability, as it has sometimes been more properly called, and estoppel, when spoken of with respect to such instruments, mean, therefore, one and the same thing. A bill of lading or carrier's receipt for goods to be transported, and the receipt of a warehouseman or wharfinger for goods in store or to be forwarded, are both contracts of bailment."[2]

IV. *The Warehouseman must have the Goods in Store before Issuing a Receipt.*

§ 314. **A statutory provision that a warehouseman shall not issue a receipt for goods unless they are actually in store** upon his premises, and in his control, is intended to protect

[1] Second Nat. Bank v. Walbridge, 19 Ohio St. 419, 2 Am. Rep. 408; and see Bigelow's Estoppel, 480.

[2] Hale v. Milwaukee Dock Co., 29 Wis. 482, 486, 9 Am. Rep. 603, per Dixon, C. J.

persons dealing in the property, and should be so construed as to promote that end. Therefore, if a receipt be issued and pledged by the holder when part of the goods mentioned in it have been received in store, and a part had not been so received, the receipt is not wholly void but void only as to the part not in store at the time the receipt was taken by the pledgee. If a warehouseman gives such a receipt to one who had fraudulently purchased the goods, and he transfers it to another who makes advances on the strength of it without notice of any fact calculated to awaken suspicion, the pledgee is entitled to hold so much of the property as was in the warehouse at the time he made the advances and took the receipt, but no more.[1]

Of course a warehouse receipt is of no validity as to goods not *in esse* at the time it is given.[2]

§ 315. **A warehouseman's receipts for goods not in his warehouse** at the time of giving the receipt, under a statute which provides that such a receipt shall not be issued until the goods have been received into possession and store, does not pass any right or title to the holder of the receipt to the prejudice of innocent third persons.[3] It would seem that if the goods are afterwards received into the warehouse the receipt so issued would be ratified and made good from that time; though the intervening rights of innocent third persons would not be affected. But it is clear that if the warehouseman thereupon executes a new receipt, which is given in pledge to secure the liability for which the original receipt was given, the new receipt takes effect at the time of its execution and delivery; but does not as against intervening rights relate back to the time of giving the original receipt, though its date be made to correspond with that.[4] The validity of the new receipt is not affected in the hands of one who acted in good faith in

[1] McCombie v. Spader, 1 Hun (N. Y.) 193, 3 Thomp. & C. 690.

[2] Montgomery v. American Trust & Sav. Bank, 71 Ill. App. 20.

[3] Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. Rep. 24. So by statute in several states. *Kentucky:* G. S. 1899, § 4772. *Virginia:* Supp. to Code 1898, c. 82.

[4] Cochran v. Ripy, 13 Bush (Ky.) 495.

taking the original receipt, by the fact that in giving the original receipt for goods not then in his warehouse and under his control, the warehouseman violated the statute and incurred the penalty it imposed. The penalty was intended for the security of innocent third persons, and the punishment will not be extended to them by declaring the contract void, although prohibited.[1]

§ 316. **A warehouseman is not bound by a receipt issued by an officer or agent acting without authority.**[2] One dealing with an agent having limited powers, is bound to inquire as to the extent of these powers and to take the risk upon himself.[3] "If, indeed, any servant could bind his master by issuing a receipt for goods committed to his charge, the condition of things would be sufficiently serious, and the statute would be pregnant with more harm than good. In this very case we have an example of what would result from such a construction of the act. A crafty agent obtains a receipt from a servant, intended only as a memorandum, pledges it to an innocent party, then obtains another receipt from the owners of the wharf, and passes that to a like innocent party, and thereby these wharfingers are liable for double the value of the property. But we may easily suppose a case in which a dishonest clerk or other employe, in connection with one or more accomplices, might in a month's time bring to ruin the wealthiest warehouseman in this city. But this will not do; such results were never intended by the makers of the statute, and a construction such as this is warranted neither by the letter nor spirit of that statute."[4]

§ 316a. **Where an officer of a warehouse company fraudulently issued the company's negotiable receipt in favor of himself and pledged it to a bank as collateral** for a loan, and it turned out

[1] Cochran v. Ripy, 13 Bush (Ky.) 495.

[2] For the like rule in regard to carriers, see §§ 245–254.

[3] People's Bank v. Gayley, 92 Pa. St. 518.

[4] Per Gordon, J., in People's Bank v. Gayley, 92 Pa. St. 518.

that the officer had no goods on deposit with the company it was held that while the officer had express authority to issue the company's negotiable warehouse receipts in favor of third parties for goods deposited by them, he had no authority to issue such receipts to himself, and it seems that he could not issue such receipts to himself, even for goods which he had actually deposited with the warehouse company.[1]

In another case upon similar facts it was held that the bank could hold the company liable as for a conversion of the goods mentioned in the certificate only by showing that the certificate was valid as to a holder thereof for value, by reason of implied authority having been conferred upon the officer to issue certificates in his own favor for goods deposited by him and not by merely showing that statements made to the bank by a representative of the company in charge of its warehouse, that the goods mentioned in the certificate were on deposit, were false; and a recovery based solely upon the falsity of such statements, and not upon the validity of the certificate by reason of implied authority to issue it, is untenable.[2]

But if an officer of a warehouse company having express authority to issue negotiable warehouse certificates to others for goods deposited, but having no such authority to issue certificates to himself, does issue warehouse certificates in his own favor, to the knowledge, express or implied, of the company's directors, their acquiescence in such acts, after having had a reasonable time to put an end thereto, will permit the inference that the act of certifying in his own favor was within the officer's actual authority, and will estop the company from denying, as to purchasers for value, that the power to so certify in fact existed.[3]

[1] Bank of New York Nat. Banking Asso. v. American Dock & T. Co., 143 N. Y. 559, 38 N. E. Rep. 713, affirming 70 Hun 152, 24 N. Y. Supp. 406. The bank's officers knew when the loan was made that the borrower was president of the warehouse company and that the loan was a personal one.

[2] Corn Exchange Bank v. American Dock & T. Co., 149 N. Y. 174, 43 N. E. Rep. 915, reversing 78 Hun 400, 29 N. Y. Supp. 158; Hanover National Bank v. American Dock & T. Co., 148 N. Y. 612, 43 N. E. Rep. 72.

[3] Hanover National Bank v. American Dock & T. Co., 148 N. Y. 612, 43 N. E. Rep. 72, 75 Hun 55, 26 N. Y. Supp. 1055.

§ 317. **A warehouse receipt for a part of certain goods stored in bulk passes no title** until such goods are separated, set apart, or marked, so as to distinguish them from the general mass, unless the receipt provides the means of making such separation.[1] This general doctrine of the common law is in some states embodied in the statutes governing warehouse receipts; but a special exception is in some states made for the case of grain stored in bulk. In other states the courts have recognized and enforced a general usage to store in bulk grain of like quality belonging to different persons who become owners in common of the whole mass, each being entitled to such a proportion as the quantity placed in store by him bears to the whole mass. This usage has necessarily followed the introduction and use of elevators for the storage of grain; and the courts have modified the common law doctrine to meet the necessities of this innovation.[2] Thus, in a recent case in Massachusetts, a pledgee of a bill of lading representing a shipment of grain, brought suit against a railroad company for a conversion of the grain, which the company had stored in its elevator, where it was mixed with other grain of a like quality, and the company, having wrongfully delivered the quantity of grain called for by the bill of lading to the consignee, contended that, because it was impossible to deliver the identical grain received, it was not liable in an action of tort, in the nature of trover, for its conversion. But it was held that this objection could not be sustained. Chief Justice

[1] Ferguson v. Northern Bank, 14 Bush (Ky.) 555, 29 Am. Rep. 418. In this state it is provided by statute that the receipt shall set forth the quality, quantity, kind, and description of the property, which shall be designated by some mark. But it was declared by the court, in the case cited, that this enactment only followed the established rule of the common law.

[2] Cushing v. Breed, 14 Allen (Mass.) 376, 92 Am. Dec. 777; Keeler v. Goodwin, 111 Mass. 490; Forbes v. Fitchburg R. Co., 133 Mass. 154; Dole v. Olmstead, 36 Ill. 150, 41 Ill. 344, 85 Am. Dec. 397, 89 Am. Dec. 386; Greenleaf v. Dows, 3 McCrary 27; Bank of Rome v. Haselton, 15 Lea (Tenn.) 216, 243; Merchants' & Manufacturers' Bank v. Hibbard, 48 Mich. 118, 11 N. E. Rep. 834; Kimberly v. Patchin, 19 N. Y. 330; Preston v. Witherspoon, 109 Ind. 457, 9 N. E. Rep. 585; Rice v. Nixon, 97 Ind. 97; National Exchange Bank v. Wilder, 34 Minn. 149, 24 N. W. Rep. 699.

Morton, in delivering the judgment of the court, said: [1] "When the grain was put in the elevator, the plaintiff and the other owners of grain stored therein became tenants in common in proportion to their respective interests. And a tenant in common of personal property may maintain trover against a stranger who converts the property or his interest in it. At the time of the delivery to the consignee, the plaintiff was the owner of the grain entitled to the immediate possession. Such a delivery was a separation of their grain, and a misappropriation of it, and was a conversion for which the appropriate remedy is an action of tort, in the nature of trover."

§ 318. **But this exception to the general rule embraces only such property as grain,** which is customarily stored in bulk, or other goods, the constituent particles of which are alike, and not distinguishable. It does not extend to such property as flour in barrels, although all the flour in store be of the same brand, of the same quality, and of uniform value;[2] or to such property as hams;[3] or bales of cotton,[4] or cases of eggs.[5]

But if a warehouseman issues his receipt for goods not ordinarily stored in bulk, such as barrels of pork, without identifying the particular barrels, or setting them apart from other barrels of pork in storage, he may be estopped as against the holder of the receipt from setting up the want of segregation of the goods receipted for from other goods. "By his receipt he has charged himself and is estopped. If a warehouseman would protect himself from liability in such cases, he can do so by describing the goods as part of a larger lot and unseparated, or in bulk, with the goods of others. Such description would give notice to any transferee of the warehouse receipt of the condition of the goods, and enable him to use the necessary diligence in obtaining the title to specific property."[6]

[1] Forbes v. Fitchburg R. Co., 133 Mass. 154.

[2] Gardiner v. Suydam, 7 N. Y. 357.

[3] Ferguson v. Northern Bank, 14 Bush (Ky.) 555, 29 Am. Rep. 418.

[4] Stewart v. Phœnix Ins. Co., 9 Lea (Tenn.) 104, 110. See State Nat. Bank v. Bryant, 49 La. Ann. 467, 22 So. Rep. 89.

[5] Fifth Nat. Bank v. Providence Warehouse Co., 17 R. I. 112, 20 Atl. Rep. 203.

[6] Goodwin v. Scannell, 6 Cal. 541.

Where storage receipts had been given for 50,000 pounds of bar iron and pledged by the owner as security for loans, the warehouseman had allowed the owner to take a part of the iron, and afterwards to restore the quantity taken. In a suit between the creditors of the owner and the holders of the receipts, the latter claimed title to all the 50,000 pounds of iron, and the claim was allowed upon the ground that the iron loaned by the warehouseman had been returned before the rights of creditors intervened, and inured to the benefit of the receipt holders, who had the right to ratify and adopt the unauthorized act.[1]

§ 318a. **The holder of a warehouse receipt for goods not entitled to be stored in bulk has the right to call for the identical goods,** and is not obliged to accept other goods of a similar description. The owner of a large number of cases of eggs stored them and received warehouse receipts which he delivered to a bank as security for a loan. The cases bore no distinguishing mark. The warehouseman in violation of his duty delivered these cases to the depositor. The loan for which the receipts were pledged not being paid, the bank brought suit against the warehouseman. It was held the latter was not entitled to deliver to the bank other cases of eggs in place of those for which the receipt was given. There was a conversion of the property by the warehouseman and the bank could maintain assumpsit without proof of a previous demand. The measure of damages was declared to be the amount of the loan secured by the receipts, it appearing that the value of the property at the time of the conversion exceeded that amount.[2]

§ 319. **If a warehouseman issues receipts for property in bulk, such as wheat, to several depositors, for a greater quantity** than he has in store, or if, having received the wheat,

[1] Bank of Rome v. Haselton, 15 Lea (Tenn.) 216, 249.

[2] Fifth Nat. Bank v. Providence Warehouse Co., 17 R. I. 112, 20 Atl. Rep. 203.

he fraudulently disposes of a part of it, so that there is not enough to satisfy all the receipt-holders, they are entitled to share in what remains, according to the equitable interest of each, to be ascertained by an accounting.[1] If a warehouseman has in store the grain of various persons, for which he has given receipts, and also grain of his own, the whole being stored in one common bulk, and he transfers all the grain to secure a creditor of his own, to be held subject to the rights of the different owners, the assignee will hold the property as trustee for the benefit of all parties in interest. He will be bound to deliver to the receipt-holders all the grain which belonged to them, but he will have the right to retain and apply to his own debt whatever grain there was in store at the time of the assignment belonging to the warehouseman.[2]

§ 320. **A warehouseman does not, by issuing his receipt, become a guarantor of the title** of the property mentioned therein to the holder of the receipt, but merely a custodian of it. His duty is performed when he gets actual possession of the property before issuing his receipt, and by delivering possession upon demand to the lawful holder of the receipt.[3]

But, if a warehouseman negligently issues two receipts for the same property, and both are taken in good faith in pledge, he is liable upon both. Thus, a warehouseman having issued a receipt for a quantity of corn, the holder of the receipt pledged it to a bank, and then directed the warehouseman to ship the corn, which he did, taking a receipt from the carrier, and delivering it to the person who took the former receipt, who thereupon obtained a bill of lading from the carrier, and attaching this to a draft, obtained a discount of it from the bank which received the first receipt in pledge. The bank had no notice that the receipt and bill of lading were for the same corn. It was held that the bank was entitled to recover of the warehouseman the value of the corn.[4]

[1] Dows v. Ekstrone, 3 Fed. Rep. 19; Dole v. Olmstead, 36 Ill. 150.

[2] Dole v. Olmstead, 36 Ill. 150, 85 Am. Dec. 397.

[3] Insurance Co. v. Kiger, 103 U. S. 352.

[4] Union Savings Asso. v. St. Louis Grain Elevator Co., 11 Mo. App. 596.

V. *The Owner of Goods can not give a Valid Receipt for them as Warehouseman.*

§ 321. **The owner of goods can not give a warehouse receipt for them,** which will be an effectual pledge of them, as against an attaching creditor, unless it be accompanied by an actual or symbolical delivery of the goods,[1] though the pledge is valid between the parties.[2] A commission merchant on applying to a banker for a discount of his promissory note, attached thereto, as collateral, a receipt by him, as follows: "Received in store, for account of P. & S. (the bankers) or their order, the following named property as security to my note given this day." The goods remained in the owner's store, and he continued to keep it open and transact business as he had done before the pledge, and the bankers did not even look at the goods. In a suit by the bankers to recover the property from a sheriff, who had attached the property in favor of a creditor of the merchant, it was urged that the receipt showed upon its face that the merchant received the goods from the plaintiffs, and that he held them thereafter in a new capacity, as agent and factor for the pledgees. To this suggestion the supreme court of New York reply:[3] "So far as creditors are concerned, if this be a pledge, the writing is to them of no moment whatever; it is only at the furthest evidence of the pledge, which would have been just as valid if it had been left in parol. The true and only essential inquiry in this case is, has there been *in fact* a delivery; none accompanied the transaction; and this disposes of all the argument made upon the suggestion that this paper on its face amounts to a warehouse receipt; for the plaintiffs can not by any fiction

[1] Thorne v. First Nat. Bank, 37 Ohio St. 254; Geddes v. Bennett, 6 La. Ann. 516; Steaubli v. Blaine Nat. Bank, 11 Wash. 426, 39 Pac. Rep. 814; Moors v. Jagode, 195 Pa. St. 163, 45 Atl. Rep. 723; Tradesmen's Nat. Bank v. Thos. Kent Mfg. Co., 186 Pa. St. 556, 40 Atl. Rep. 1018.

[2] Alabama State Bank v. Barnes, 82 Ala. 607, 2 So. Rep. 349; Merchants' & Manuf. Bank v. Hibbard, 48 Mich. 118, 11 N. W. Rep. 834; Cochran v. Ripy, 13 Bush (Ky.) 495; Parshall v. Eggert, 54 N. Y. 18.

[3] Parshall v. Eggart, 52 Barb. (N. Y.) 367, 376.

avoid meeting the undisputed fact that the subject of the pledge was not delivered to them until the debt had matured, and after the claim of the attaching creditor had become prior and superior.'"[1] But whatever weight these views may have in themselves, their authority is subject to the declaration of the commission of appeals in deciding this case, that the receipt might be considered as showing conclusively against pledgor, that the property was delivered by him to the pledgee, and by the latter redelivered to him to be held as security for the pledgee, according to the terms of the receipt.[2] The case was, however, decided upon another ground.[3]

And so a warehouse receipt issued by a warehouseman upon his own grain as collateral security, is invalid as against a prior purchaser who holds a valid receipt therefor.[4] Even a delivery of the keys of the warehouse to the holder of the invalid receipt does not amount to a valid delivery of the grain to him as against such prior purchaser.

§ 322. **In two or three states it is provided by statute that the owner of a private warehouse may issue receipts for his own property** which shall have the effect of receipts issued by a public warehouseman to other persons storing property therein. Thus, in Nebraska any person, firm or corporation engaged in the business of packing pork, or beef, or manufacture of distilled spirits, or of linseed oil, or raising chicory roots, or manufacturing chicory, or producing, owning or handling any product, manufactured article or merchandise, or any other article or product capable of being stored, having a warehouse for the storage of his or its own products, and any person, firm or corporation being the keeper, proprietor or owner of any elevator, warehouse, crib or tanks, wherein is stored any of the products or articles contemplated by this act belonging to such keeper, proprietor or owner, may issue re-

[1] The decision upon this point of delivery was reversed upon appeal. Parshall v. Eggert, 54 N. Y. 18.

[2] Parshall v. Eggert, 54 N. Y. 18, 23.

[3] See § 39.

[4] Sexton v. Graham, 53 Iowa 181, 4 N. W. Rep. 1090.

ceipts for his or its own property as contemplated by this act, which such person, firm or corporation has so stored, in the usual form of warehouse receipts, which shall have the same force and effect as the receipts issued by the keeper of a public warehouse to parties having property so stored therein, which receipt shall be negotiable by indorsement and entitle the *bona fide* holder thereof, advancing money on the credit of the same, to a lien upon the property so stored and described therein for the money so advanced as to all subsequent purchasers and creditors of any person interested therein, from the date of issuance of such receipts and the advance of the money.[1]

In Wisconsin a warehouse receipt issued by any person or persons, keeping, running and managing a public warehouse, on goods, wares or merchandise owned by him or them, and which he or they have, at the time of issuing such warehouse receipt, actually stored in the said warehouse, shall have the same force and effect to protect the owner and holder thereof on any loan or advance of money he may have made on the same, as a warehouse receipt issued by the keeper and manager of a public warehouse to any other person who brings goods, wares or merchandise to be stored in such public warehouse.[2]

§ 323. **In Kentucky,[3] a warehouseman is impliedly authorized by statute to give receipts** or vouchers for his own goods, when stored and under his control and kept in his own warehouse or a warehouse kept by him. If the goods are at the time in his possession, his receipt vests in the holder a right to the property, and no one without his written consent or transfer, and the production of the receipt, can gain any title thereto.[4] This statute also requires that the receipt should show upon its face any lien or incumbrance that might exist upon the property in favor of the warehouseman. Therefore, if a

[1] Comp. Stats. 1899, § 5356.

[2] Laws 1899, c. 146. See, also, c. 251.

[3] Act of March 6, 1869.

[4] Cochran v. Ripy, 13 Bush (Ky.) 495; Ferguson v. Northern Bank of Ky., 14 Bush (Ky.) 555, 29 Am. Rep. 418.

warehouseman himself sells goods upon credit and gives a receipt for the same, to be delivered on return of the receipt and payment of the storage and charges, and the purchaser indorses the receipt to an innocent holder as collateral to secure a loan obtained on the faith of the receipt, the latter has a right to have the property applied in the first place to the payment of the loan; and it is immaterial that the purchaser of the property acted fraudulently in the transaction.[1] A provision of the statute forbidding the issuing of a second receipt without the written consent of the holder of the prior receipt, is intended to protect the holder of the second receipt, and does not allow the holder of the first receipt to repudiate his oral agreement that the holder of the property might sell it. He is as much estopped to deny the authority to sell, and the title of the innocent purchaser, as he would be if had stood by in person, and acquiesced in the sale without asserting claim to the property.[2]

§ 324. **A receipt signed by the agent or servant of the owner has no more effect than the owner's own receipt.** If such a receipt be transferred by the owner as collateral security for a loan, and the property remains upon the owner's premises, it affords no protection to the creditor, but the property may be taken in execution by the creditors of such owner. As between the owner and his agent such a receipt is a nullity, and as between the owner and his pledgee it is wholly ineffectual as a pledge.[3]

§ 325. **An instrument in the form of a warehouse receipt executed by a debtor to his creditor, on the debtor's own property,** is not a warehouse receipt.[4] A receipt issued by a pri-

[1] Greenbaum v. Megibben, 10 Bush (Ky.) 419; and see Cochran v. Ripy, 13 Bush (Ky.) 495.

[2] Farmer v. Gregory, 78 Ky. 475.

[3] Yenni v. McNamee, 45 N. Y. 614.

[4] Thorne v. First Nat. Bank, 37 Ohio St. 254; Bucher v. Commonwealth, 103 Pa. St. 528; Shepardson v. Cary, 29 Wis. 34; Sinsheimer v. Whitely, 111 Cal. 378, 52 Am. St. 192, 43 Pac. Rep. 1109; Geilfuss v. Corrigan, 95 Wis. 651, 70 N. W. Rep. 306, 37 L. R. A. 166; Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147, 152, 153; Nation-

vate warehouseman for his own property, in his own warehouse, and delivered by him as collateral security for his own debt, vests no title to the property in the holder as against other creditors, and in bankruptcy proceedings against the debtor the holder of such a receipt has no preference. Such a receipt confers no possession, actual or constructive, which is essential to a pledge.[1] Neither does it amount to a mortgage of the property, because no possession is conferred upon the mortgagee, nor does it, in fact, amount to a written mortgage. Even if it did amount to a mortgage, it would not be valid without record, according to the statute. The receipt might constitute a valid contract between the parties, but it amounts to nothing as against the creditors of the person who makes it.[2]

A private warehouseman having issued receipts for his own property, in his own warehouse, and delivered them as security for his indebtedness, it was held that the person taking such receipts acquired no title to the property described as against other creditors, and in bankruptcy proceedings was not entitled to any preference. It did not appear that the bankrupt used his warehouse as a warehouse under the statute, in any other way than for the purpose specially intended by the bankrupt. It did not appear that the property of any other

al Exchange Bank v. Wilder, 34 Minn. 149, 24 N. W. Rep. 699; Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. Rep. 244; Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. Rep. 24; State v. Bryant, 63 Md. 66; Conrad v. Fisher, 37 Mo. App. 352, 368; Valley Nat. Bank v. Frank, 12 Mo. App. 460.

Under the Kentucky statute relating to warehouse receipts, it seems that a private warehouseman may issue receipts upon his own property. Cochran v. Ripy, 13 Bush (Ky.) 495; Ferguson v. Northern Bank, 14 Bush (Ky.) 555; Newcomb v. Cabell, 10 Bush (Ky.) 460; Farmer v. Gregory, 78 Ky. 475.

[1] Farmers' & Mechanics' Nat. Bank v. Lang, 87 N. Y. 209, 215. Finch, J., said; "There was, therefore, never any valid pledge by the borrower, nor any actual warehouse receipt. What was so called operated in each instance to transfer the title of the property described, as between the borrower and the bank, and such transfer, being collateral to the payment of a debt, could operate only as a mortgage." Also, Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. Rep. 592; Mechanics' Trust Co. v. Dandridge (Ky.), 37 S. W. Rep. 288.

[2] Adams v. Merchants' Nat. Bank, 2 Fed. Rep. 174, 9 Biss. 396; Yenni v. McNamee, 45 N. Y. 614.

person than that of the bankrupt was stored in the warehouse. The case was one, therefore, where the bankrupt, having purchased and taken possession of property, stored it in his warehouse, for which a permit under the statute had been obtained, and issued receipts for the same, and transferred them, through a third person to whom they were issued, to the bank as collateral security for the loan made. There was consequently no pledge, for there was no delivery of possession. Neither was there any valid mortgage of the property, because there was no possession in the mortgagee, nor was there, in fact, any written mortgage.[1]

It was claimed that the assignee took no greater rights than the bankrupt had, and that this contract, being valid between the parties, was valid against the assignee. But the court declared that the rule did not apply to cases of this kind; but that the assignee had the right of a judgment creditor, where the mortgage or pledge is invalid in consequence of wanting any element requisite under the law or under the statute.[2]

§ 325a. **Even a public warehouseman has no power to issue a warehouse receipt upon his own property** in his warehouse as security for a debt, unless authority to do so be expressly given by statute.[3] An exception to this rule has been established by decisions in several courts, the supreme court of Minnesota holding that the owner of goods, if a warehouseman, can pledge the same by issuing and delivering his own warehouse receipt to the pledgee.[4] In the Minnesota case, Mitchell, J., said: "The tendency of the latter authorities (although the proposition has been sometimes doubted or denied) is to hold

[1] Adams v. Merchants' Nat. Bank, 2 Fed. Rep. 174, 9 Biss. 396; Gibson v. Stevens, 8 How. 384; Gibson v. Chillicothe Bank, 11 Ohio St. 311; Yenni v. McNamee, 45 N. Y. 614; Shepardson v. Green, 21 Wis. 539.

[2] Adams v. Merchants' Nat. Bank, 2 Fed. Rep. 174, 9 Biss. 396.

[3] Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. Rep. 592.

[4] National Exchange Bank v. Wilder, 34 Minn. 149, 24 N. W. Rep. 699. Distinguished from Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. Rep. 244; Merchants' and Manufacturers' Bank v. Hibbard, 48 Mich. 118, 11 N. W. Rep. 834.

that the owner of goods, if a warehouseman, can pledge the same by issuing and delivering his own warehouse receipt to the pledgee.[1] The power of a warehouseman to make a delivery in this way, in case of a sale, is well settled.[2] And we are unable to see any good reason founded on principle for any distinction in this regard between a sale and a pledge. * * * There is no good reason in the nature of things why a delivery which is sufficient in case of a sale should not be so in case of a pledge. When the pledgor or the vendor is a warehouseman, the public has notice from that fact that the title and legal possession of property in his warehouse may be in others, although the actual physical possession is in himself."[3]

§ 326. **There is a distinction between cases of sales and cases of pledges,** as regards the effect of the delivery of receipts for the property. When a vendor delivers to the purchaser his own receipt for the property sold, the vendor may be regarded as bailee of the property for the purchaser, so that the title may be regarded as in the purchaser by virtue of the receipt. When the receipt is given by the owner of the goods merely as collateral security, and not for the purpose of carrying out an absolute sale, it comes within the principle of a mortgage of chattels, which must, to be valid as against third persons, be made and recorded in compliance with statutory law. Yet, as between the parties themselves, such a receipt is a lawful contract, and effects a valid transfer of the property according to its terms.[4] Thus a pledgee holding such a

[1] Citing Easton v. Hodges, 18 Fed. Rep. 677; Merchants' etc., Bank v. Hibbard, 48 Mich. 118, 11 N. W. Rep. 834.

[2] Citing Gibson v. Stevens, 8 How. 384; Broadwell v. Howard, 77 Ill. 305.

[3] National Exchange Bank v Wilder, 34 Minn. 149, 155, 24 N. W. Rep. 699.

[4] Gibson v. Stevens, 8 How. 384; Gibson v. Chillicothe Bank, 11 Ohio St. 311; the latter distinguished from Thorne v. First Nat. Bank, 37 Ohio St. 254; Hoyt v. Hartford F. Ins. Co., 26 Hun (N. Y.) 416; Farmers' & Mechanics' Nat. Bank v. Lang, 87 N. Y. 209; Yenni v. McNamee, 45 N. Y. 614; Adams v. Merchants' Nat Bank, 2 Fed. Rep. 174, 178, referring to the cases of Shepardson v. Green, 21 Wis. 539, and Shepardson v. Cary, 29 Wis. 34, and the language of the court in the last named case criticised as not consistently following the distinction above taken. Alabama State Bank v. Barnes, 82 Ala. 607, 2 So. Rep. 349.

receipt is entitled, as having the title to the property designated, to recover upon an insurance policy upon such property assigned to him for further security.[1]

[1] Hoyt v. Hartford F. Ins. Co., 26 Hun (N. Y.) 416.

CHAPTER VIII.

PLEDGES BY AGENTS OR FACTORS.

I. *Pledges by Agents or Factors at Common Law.*

§ 327. **By the common law a factor or agent had no power to pledge goods** which his principal had intrusted to his possession, although the factor or agent had made advances to his principal upon the goods, and had a lien thereon for the advances.[1] Although the principal had drawn upon his factor for the value of the property consigned, he was not authorized to pledge the goods even to raise funds to meet the bills.[2] The rights of the principal and factor whenever this relation existed, and whatever might be the circumstances, were regarded

[1] Patterson v. Tash, 2 Str. 1178; Daubigny v. Duval, 5 T. R. 604; Gill v. Kymer, 5 Moore 503; M'Combie v. Davies, 7 East 5; Martini v. Coles, 1 M. & S. 140; Queiroz v. Truemen, 3 B. & C. 342, 348; De Bouchout v. Goldsmid, 5 Ves. 210; Pickering v. Busk, 15 East 38, 43; Peet v. Baxter, 1 Stark. 472; Warner v. Martin, 11 How. 209; First Nat. Bank v. Nelson, 38 Ga. 391, 95 Am. Dec. 400; Bott v. McCoy, 20 Ala. 578, 56 Am. Dec. 223; McCreary v. Gaines, 55 Tex. 485, 13 Rep. 797; Benny v. Rhodes, 18 Mo. 147, 59 Am. Dec. 293; Benny v. Pegram, 18 Mo. 191, 59 Am. Dec. 293; Steiger v. Third Nat. Bank, 6 Fed. Rep. 569; Holton v. Smith, 7 N. H. 446; Campbell v. Reeves, 3 Head (Tenn.) 226; Merchants' Nat. Bank v. Trenholm, 12 Heisk. (Tenn.) 520; Van Amringe v. Peabody, 1 Mason 440; Hoffman v. Noble, 6 Met. (Mass.) 68, 39 Am. Dec. 711; Newbold v. Wright, 4 Rawle (Pa.) 195; Wright v. Solomon, 19 Cal. 77; Cleveland v. Shoeman, 40 Ohio St. 176, 182; Anderson v. McAleenan, 15 Daly 444, 29 N. Y. St. Rep. 406, 8 N. Y. Supp. 483.

[2] Graham v. Dyster, 2 Stark. 21, 6 M. & S. 1, 14.

as depending on the law merchant, which was part of common law. By this law a factor was but the attorney of his principal, and he was bound to pursue the powers delegated, and could not go beyond them.[1] An agent to sell goods, though being the apparent owner by reason of having possession by permission of the principal, could not pledge them for his own debt, or that of his consignor. No usage of trade allowed this. The agency was to sell only. A creditor to whom a factor offered goods in pledge was bound at his peril to inquire and know the extent of the factor's title to the goods, or of his authority to deal with them.

Lord Chancellor Selborne stated the law to this effect, saying: "It is manifest that when a man is dealing with other people's goods, the difference between an authority to sell and an authority to mortgage or pledge is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money; but when goods are deposited by way of security for money borrowed, it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if, on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely, that of borrowing money and contracting the relation of debtor with a creditor while retaining a redeemable title to the goods instead of exchanging the title to the goods for a title unaccompanied by any indebtedness to their full equivalent in money.."[2]

The cases which in England established the doctrine that a factor could not effectually pledge for his own debts goods placed in his hands for sale, although he had made advances upon them, proceeded upon the ground that the interest of the factor was merely a lien and not a pledge; and inasmuch as a

[1] Kinder v. Shaw, 2 Mass. 398; Odiorne v. Maxcy, 13 Mass. 178; Scott v. Owen, Wils. 400, 405.
See article on Unauthorized Sales and Pledges by Agents, by William Evans, Esq., 63 Law Times 333, 357, 377, 390, 402.

[2] City Bank v. Barrow, 5 App. Cas. 664, 670.

lien is a personal right of detention, which can not be assigned to another, it followed that a factor had no interest of his own which he could pledge; and as he could not pledge his principal's interest without direct authority to do so, he could transfer no interest whatever by delivery of his principal's goods in pledge. Where money has been advanced on goods consigned for sale, the character of the transaction is that of a lien, and not of a deposit, by way of pledge.[1]

§ 328. **A factor or agent with power to sell only has at common law no power to pledge** his principal's goods for his own debt or that of his principal. A power to sell, such as is possessed by a factor appointed for that purpose, can only be exercised by way of sale.[2] The fact that goods were invoiced to the person making the pledge, as purchaser, and not as factor, does not estop the owner from claiming the goods as against the pledgee, in case the pledgee had no knowledge of this fact at the time of the pledge, and hence could not claim that he was misled.[3] "At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was

[1] Smart v. Sandars, 3 C. B. 380, 400, 401, 5 C. B. 895, 917.

[2] 2 Kent Com., 625; Patterson v. Tash, 2 Strange 1178; Martini v. Coles, 1 M. & S. 146; Warner v. Martin, 11 How. 209; Rodriguez v. Heffernan, 5 Johns. (N. Y.) Ch. 429; First Nat. Bank v. Schween, 127 Ill. 573, 20 N. E. Rep. 681; Gray v. Agnew, 95 Ill. 315; First Nat. Bank v. Nelson, 38 Ga. 391, 95 Am. Dec. 400; Nat. Exchange Bank v. Graniteville Mfg. Co., 79 Ga. 22, 25, 3 S. E. Rep. 411; Robinson v. Nevada Bank, 81 Cal. 106, 22 Pac. Rep. 478; Silverman v. Bush, 16 Ill. App. 437; Baxter v. Sherman, 73 Minn. 434, 76 N. W. Rep. 211; Ryan v. Stowell, 31 Neb. 121, 47 N. W. Rep. 637.

[3] Gray v. Agnew, 95 Ill. 315; McCreary v. Gaines, 55 Tex. 485, 13 Rep. 797.

In Leet v. Wadsworth, 5 Cal. 404, however, where the factor had purchased goods in his own name, had stored them in his own name, and had paid the storage for eighteen months, it was held that he had such apparent ownership of the goods that he was entitled to pledge them.

that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledgor had authority to sell or pledge. If the owner of the goods had so acted as to clothe the seller or pledgor with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bona fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited. And the possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill of lading for goods *in transitu* had the same effect in defeating the unpaid vendor's right to stop *in transitu* that an actual delivery of the goods themselves, under the same circumstances, would have had. But the transfer of the document of title, by means of which actual possession of the goods could be obtained, had no greater effect at common law than the transfer of the actual possession.'"[1]

Where a factor, warehouseman and commission merchant who had in his warehouse certain cotton belonging to a customer, on which he had made advances and on which he claimed a factor's lien, transferred and constructively delivered, by warehouse receipt in usual form, not his lien, but the cotton itself, to a bank, as a pawn or pledge for the payment of a certain sum advanced by the bank to him, the cotton not being removed from the actual custody of the warehouseman or its location changed, the bank had neither title to the cotton nor such possession as would give it the right to maintain an action of trover against a *bona fide* purchaser who subsequently bought, paid for, took possession of and removed the cotton without notice of the pledge made by the factor to the bank.[2]

[1] Cole v. North Western Bank, L. R. 10 C. P. 354, 362.

[2] National Exchange Bank v. Graniteville Manuf. Co., 79 Ga. 22, 3 S. E. Rep. 411.

§ 328a. **But at common law a principal is bound by the acts of an agent making a pledge either by previous direction or subsequent ratification.** A woman bought one hundred shares of stock in a corporation through an agent who acted for her as a friend, without pay. One month later the agent ordered a broker to buy one hundred shares more on sixty days' credit, and deposited the first purchased shares as security. Ten days afterwards the principal asked the agent how she should know, if anything happened to him, that she had any stock. He said he would give her something to show her title, and wrote, signed, and delivered to her the following order, addressed to the broker: "The one hundred shares of stock you purchased for me" on a day named, "for which you have been paid, and the one hundred shares you purchased for me" on a later day named, "buyer 60, receiving from me the one hundred shares of stock as collateral security, were bought by me for (the principal, naming her). Please deliver the stock to her, if she calls for it at any time." Six months afterwards the principal ordered the agent to sell her stock, supposing that she had the original shares; and a hundred shares regarded as hers by the agent were sold at a loss. The principal subsequently attempted to repudiate the transaction set forth in the above order, and brought an action against the agent for the conversion of the first one hundred shares of stock. It was held that the principal must be presumed to have understood the contents of the written order; that her silence ratified the purchase, and consequently the pledge; and that the action could not be maintained.[1]

A power of attorney authorizing the attorney in fact to sell, transfer, and release certain mortgages specified, and to indorse and transfer the notes thereby secured, and to sell and transfer the claims of the principal for said notes and mortgages against the estate of the deceased mortgagor, confers only a power to sell and transfer the title to the securities absolutely, and no power is conferred thereby to hypothecate the mortgages as

[1] Metcalf v. Williams, 144 Mass. 452, 11 N. E. Rep. 700.

security for borrowed money, and such hypothecation, being in excess of authority, is void, and vests no right in the person to whom the hypothecation is made.[1]

§ 329. **It does not matter that the agent is not known as a factor,** or that he puts his principal's goods among his own, and exposes both for sale in the same way. Thus, if one place goods in custody of a retail dealer to sell upon commission, and he places such goods in his shop, and exposes them for sale with his own goods, and then having need for a loan of money obtains it upon a pledge of his principal's goods together with his own, the pledgee, though acting in good faith and relying upon the apparent ownership of the borrower, obtains no lien upon the goods held for sale upon commission.[2]

It is really immaterial whether or not the pledgee knew that he was dealing with a factor; for if he knew he was dealing with a factor he is bound to know that by law the factor had no right to pledge his principal's goods, without the direct authority of the latter, of which the pledgee must at his peril satisfy himself.[3] If, on the other hand, he did not know that he was dealing with a factor, his want of knowledge of this fact does not extend the factor's authority over his principal's goods. In short, he is in any event bound to know at his peril whether the person with whom he is dealing is the real owner of the goods offered in pledge.

The fact that one who is notoriously an agent or factor sometimes acts as a general merchant, or deals on his own account, does not exempt him from the general rule that a factor can not pledge for his own use goods with which he has been intrusted to sell.[4]

[1] Hawxhurst v. Rathgeb, 119 Cal. 531, 51 Pac. Rep. 846.

[2] Kinder v. Shaw, 2 Mass. 398, and a similar case, McCreary v. Gaines, 55 Tex. 485, 40 Am. Rep. 818.

[3] Bott v. McCoy, 20 Ala. 578, 56 Am. Dec. 223; Baxter v. Sherman, 73 Minn. 434, 76 N. W. Rep. 211.

[4] Phillips v. Huth, 6 M. & W. 572; Martini v. Coles, 1 M. & S. 140; Baring v. Corrie, 2 B. & Ald. 137; M'Combie v. Davies, 6 East 538; Bragg v. Meyer, McAllister 408.

Contrary to the general rule, see Hutchinson v. Bours, 6 Cal. 383, where the court, while recognizing

§ 330. **The factor himself is estopped from taking advantage of his wrongful act,** in pledging his principal's goods for his own debt. Every pledgor impliedly warrants his own title, or that he has full authority to make the pledge. He can not therefore bring trover or detinue in his own name, against the pledgee, on the ground that he had tortiously violated his authority in pledging his principal's goods. The latter is the person injured, and he can ratify or disaffirm the act of his agent at his pleasure.[1]

§ 331. **But it seems that a factor's or broker's lien might at common law be assigned as security for an amount not exceeding that secured by the lien,** provided the assignment was expressly so limited. In M'Combie v. Davies,[2] it appeared that a broker had pledged for his own debt goods of his principal upon which he had a lien. Lord Ellenborough, after saying that "nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods," added, "that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal, by the broker undertaking to pledge them as his own, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of the goods on which he has the lien to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him." And even where the assignment in pledge has not been expressly limited to the amount of the

the general rule, say that "where the party pledging is technically a factor, where his only business is to sell goods consigned to him for that purpose," he has no power to pledge them; and they deny its application to the case in hand, because the pledgor was not a technical broker, whom they define to be one whose only business is to sell goods consigned to him.

[1] Bott v. McCoy, 20 Ala. 578, 56 Am. Dec. 223.

[2] 7 East 5, 7.

A factor who has made advances on the credit of the goods consigned to him for sale, has clearly a right to sell enough to reimburse his advances, unless restrained by some agreement with his consignor. Fordyce v. Peper, 16 Fed. Rep. 516; Brown v. M'Gran, 14 Pet. 479.

factor's advances, it has been held that his pledge of his principal's goods is valid to the extent of such interest, provided he retains the power to control the sale of the goods.[1]

Chief Justice Kent, in an opinion in which he referred with approval to the case of M'Combie v. Davies, held that a factor may deliver the possession of goods, on which he has a lien, to a third person, with notice of the lien, and with a declaration that the transfer is to such person as agent of the factor, and for his benefit.[2] In such case there is in effect a continuance of the factor's possession.

§ 332. **At common law there is no substantial difference between the effect of a pledge made by a factor and one made by a pledgee.**[3] A distinction has sometimes been taken between a pledge by the one and a pledge by the other on the ground that a factor has only a lien for his advances, whereas a pledgee has a special property in the pledge. But a factor is generally regarded as holding in pledge the goods upon which he has made advances. He is regarded as having a special property in such goods, and not merely a lien upon them. A distinction may properly be drawn between the rights of a pledgee or factor and those of a mere lien-holder, in regard to pledging the property. The former has the right of possession accompanied by the right to exercise acts of ownership in the disposition of the property, for the factor has a general power to sell, while a pledgee has the right to sell upon the pledgor's making default in payment of the debt secured. But the holder of a mere lien has no right to exercise acts of owner-

[1] Blair v. Childs, 10 Heisk. (Tenn.) 199.

[2] Urquhart v. M'Iver, 4 Johns. (N. Y.) 103, 116.

[3] First Nat. Bank v. Boyce, 78 Ky. 42, 39 Am. Rep. 198. In Donald v. Suckling, 1 Q. B. 585, 597, Shee, J., said: "In all the decisions on pledges by factors the relation between a factor who has made advances on the goods intrusted to him and his principal has been held not distinguishable, or barely distinguishable, in its legal incidents, from the relation between pawnee and pawnor." Judge Story, writing in regard to this matter, says "it is not easy to point out any substantial distinction between the case of a pledgee and the case of a factor." Bailm., § 327

ship in the disposition of the property. It is only by the intervention of a court of equity, or by the use of some statutory process that he can divest the owner of his title in satisfaction of the lien. In a leading English case upon this subject Mr. Justice Mellor said:[1] "I think that when the true distinction between the case of a deposit by way of pledge of goods for securing the payment of money, and all cases of *lien*, correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited, and I think that, although he can not confer upon any third person a better title or a greater interest than he possesses, yet if nevertheless he does pledge the goods to a third person for a greater interest than he possesses, such an act does not annihilate the contract of pledge between himself and the pawnor, but that the transaction is simply inoperative as against the original pawnor, who, upon tender of the sum secured immediately becomes entitled to the possession of the goods, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods."

The legal effect of a pledge by a factor is therefore the same as that of a pledge by a pledgee. Neither the one nor the other is tortious to such an extent as to render the pledge absolutely void *ab initio;* but the pledge is good to the extent of the pledgor's interest in the property.[2]

II. *The Factors' Acts, their Application and Effect.*

§ 333. **The purpose of the factors' acts** is to avoid the inconveniences to trade and commerce which were found to attend the general rule of the common law, that he who deals with one *ex mandato*, can obtain from him no better title than

[1] Donald v. Suckling, L. R. 1 Q. B. 585, 610.

[2] §§ 418-423; Story Bailm., § 327; Donald v. Suckling, L. R. 1 Q. B. 585, 610.

his mandate enables him to bestow.[1] "Before the passing of the factors' act," says Baron Parke,[2] "it was clearly settled that a factor or agent for sale had no power to pledge, whether he was in possession either of the goods themselves or of the symbol of the goods, and even though the symbol might bear on the face of it some evidence of the property being in himself, as in the case of a bill of lading in which he was consignee or indorsee."

The several factors' acts, though not all in the same terms, agree in their general purpose, which is to enable third persons to deal with an agent intrusted with goods, or with the documents of title to goods, for sale, as though he were the absolute owner of the goods.[3] "The general rule of law is, that, where a person is deceived by another into believing that he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner. The legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who *bona fide* deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell or to procure the advance."[4]

§ 333a. **California.**—A factor has actual authority: 1. To insure property consigned to him uninsured. 2. To sell, on credit, anything intrusted to him for sale, except such things as it is contrary to usage to sell on credit; but not to pledge, mortgage, or barter the same; and, 3. To delegate his author-

[1] First Nat. Bank v. Shaw, 61 N. Y. 283, per Dwight, C.; Cartwright v. Wilmerding, 24 N. Y. 521, 529.

[2] Phillips v. Huth, 6 M. & W. 572, 596.

[3] Allen v. St. Louis Bank, 120 U.S. 20, 37, 7 S. C. Rep. 460; Henry v. Philadelphia Warehouse Co., 81 Pa. St. 76; Wisp v. Hazard, 66 Cal. 459, 6 Pac. Rep. 91; Wright v. Solomon, 19 Cal. 64, 79 Am. Dec. 196; Davis v. Russell, 52 Cal. 611, 28 Am. Rep. 647; Dodge v. Meyer, 61 Cal. 405; Cartwright v. Wilmerding, 24 N. Y. 521; New York Security & Trust Co. v. Lipman, 157 N. Y. 551, 52 N. E. Rep. 595, affirming 91 Hun 554, 36 N. Y. Supp. 355.

[4] Cole v. North Western Bank, per Blackburn, J., L. R. 10 C. P. 354, 372.

ity to his partner or servant, but not to any person in an independent employment.[1]

§ 334. **Louisiana.**[2]—All merchants, factors, and others who may have a general balance of account, or any sum of money due them by any consignor or other person sending them cotton, sugar, or other agricultural products for sale at the port of New Orleans, or at any other town in the state, shall have a pledge upon all such property consigned or sent to them by ship, vessel, railroad, or other carrier, from the time the bill of lading or receipt therefor by the carrier, is deposited in the mail or given to the carrier for transmission, which pledge shall be perfect, with the right of sale of said property, which shall be fully vested in said consignee, with the right to appropriate the proceeds of sale to the amount due consignee; provided that nothing herein shall be so construed as to defeat or lessen the privilege of any laborers and landlords in this state for wages and rent, as now existing by law.

Under a statute giving a consignee a lien by way of pledge upon goods consigned to him for his advances upon them, if he has control of the goods, "or if before their arrival he can show by a bill of lading, or letter of advice, that they have been dispatched to him,"[3] the consignee, after receiving such letter of advice, or a bill of lading, has a lien which can not be defeated by the consignor's drawing a draft against the goods, obtaining a discount of it, and using the proceeds for the purchase of the goods so consigned.[4]

By a recent statute[5] in this state, it is provided that a party

[1] Civ. Code, § 2368; Dodge v. Meyer, 61 Cal. 405, 429.

[2] Act of 1874, No. 66. See, as amended, R. S. 1897, p. 685.

Under this act a consignee of goods has possession from the moment the bill of lading is given to the carrier for transmission, and from that moment they are effectually pledged to him. Therefore, when one purchased cotton at Shreveport without paying for it, and shipped it to New Orleans, it was held that the consignee had a pledge of the cotton from the time the bill of lading was given to the carrier for transmission, superior to the vendor's lien under the code for the unpaid purchase-money. Florsheim v. Howell, 33 La. Ann. 1184.

[3] Louisiana R. Code 1900, Art. 3247.

[4] Helm v. Meyer, 30 La. Ann. 943.

[5] Acts of 1876, p. 114, §§ 4, 5.

who may borrow money on the faith of warehouse receipts representing property in store, shall file their affidavit with the pledgee that such property is his, the pledgor's, personal property, or that it is the property of some party for whom the pledgor is acting as agent, factor, commission merchant, or in any other fiduciary capacity, and that said party is justly and truly indebted to the pledgor in an amount equal in value to the value of the property pledged, as specified in the warehouse receipt, for moneys paid to him, or paid by his order, and for his account, by the party or consignee making the pledge.

The vendor's lien of five days' privilege, now allowed in commercial transactions for the payment of the purchase price, shall not be affected by the provisions of this act, except in cases in which a warehouse receipt has been pledged as collateral for money borrowed. The holder of the warehouse receipt shall be considered and held as the actual owner of the property described in the receipt, and no clause of this act shall operate to the detriment or injury of the holder of a warehouse receipt, to the extent of the value of the property specified, made and issued in accordance with, and under the provisions of this act, provided that where the factor, agent, or pledgor may have wrongfully pledged, in violation of this act, any property, the lien of the owner shall be valid, even against the third holder of the warehouse receipt.

Before the enactment of this latter statute,[1] a factor could not pledge for his own debts the property of his principal.[2] This act makes warehouse receipts the representatives of property in store, and provides for their use to borrow money upon; but the implication is clear that their use in that way by a factor for more than the value of his interest in the property would be wrongful and invalid against the owner. Therefore, where a factor has no interest in the consigned property, he can not now pledge it for his own debt any more than he could before

[1] Acts 1876, p. 113, No. 72.

[2] Stetson v. Gurney, 17 La. Ann. 163, 166; Hadwin v. Fisk, 1 La. Ann. 43; Miller v. Schneider, 19 La. Ann. 300, 92 Am. Dec. 535; Young v. Scott, 25 La. Ann. 313; Insurance Co. v. Kiger, 103 U. S. 352.

the enactment of the statute. His pledge of such property, though accompanied by a warehouse receipt setting forth that the property is deliverable to the pledgee, is invalid, and confers no title adverse to that of his consignor. The factor's pledge to his creditor is good to the extent of his advances to his principal, and only to that extent.[1]

§ 335. **Maryland.**[2]—Any person intrusted with and in possession of any bills of lading, storekeeper's or inspector's certificates, order for the delivery of goods, or other document showing possession, shall be deemed the true owner of the goods, wares, or merchandise described therein, so far as to give validity to any contract thereafter to be made by such person with any other person or body corporate for the sale or disposal of the said goods, wares, or merchandise, or for the pledge or deposit thereof as a security for any money or negotiable instrument advanced or given on faith of such documents, or either of them; provided, that such person or body corporate shall not have notice, by such document or otherwise, that the person so intrusted is not the actual and *bona fide* owner of such goods, wares, and merchandise.

If any person or body corporate shall take any goods, wares, or merchandise, or any document mentioned in the foregoing clause, in deposit or pledge from any person so intrusted with the same, or to whom the same may be consigned, or who may be intrusted with and in possession of any such bill of lading, storekeeper's or inspector's certificate, order for the delivery of goods, or other such document showing possession, without notice, as a security for any debt or demand existing before the time of such deposit or pledge, then such person shall acquire such right, title, or interest as was possessed and might have been enforced by the person from whom he received the same, and no more.

Any person or body corporate may take any goods, wares,

[1] Chambers v. Hubbard, 51 La. Ann. 887, 25 So. Rep. 536.

[2] R. Code 1878, pp. 291, 292, §§ 3, 5, 6, p. 294, § 14; 1 Pub. Gen. Laws, p. 4, § 3, p. 5, §§ 5, 6, p. 7, § 13.

or merchandise, or any such document as aforesaid, in deposit or pledge as a security for a pre-existing debt or demand from such agent or factor, knowing him to be such, but with such notice they shall only acquire the right or interest therein which was possessed by such agent or factor at the time of the deposit or pledge; but if he shall have notice that such agent or factor had no authority from his principal to pledge or deposit the same, or to part with the possession thereof, in such case such person or body corporate shall acquire no right or interest therein.

Every mortgage, pledge, deposit, or other disposal by said commission merchant, factor, agent, bailee, or consignee of agricultural productions, consigned for sale alone, unless with the consent of the grower, producer, or other owner, expressly given, shall be null and void, and no title to said articles, or any of them, shall pass to the person receiving the same, but the title thereto shall remain in the grower, producer, or other consignor thereof, as if no such mortgage, pledge, deposit, or other disposal had been made.

§ 336. **Massachusetts.**[1]—Every person in whose name merchandise is shipped for sale by a person in the lawful possession thereof at the time of the shipment, shall be deemed to be the true owner thereof, so far as to entitle the consignee to a lien thereon for money advanced, or securities given to the shipper for one on account of such consignment, unless the consignee, at or before the time when he made the advances or gave the securities, had notice by the bill of lading, or otherwise, that the shipper was not the actual and *bona fide* owner.

Every factor or other agent intrusted with the possession of merchandise or a bill of lading, consigning merchandise to him for the purpose of sale, shall be deemed to be the true owner thereof, so far as to give validity to any *bona fide* contract made by him, with any other person for the sale of the whole or any part of such merchandise.

When a person intrusted with merchandise, and having au-

[1] G. S. 1860, c. 54; P. S. 1882, c. 71.

thority to sell or consign the same, ships or otherwise transmits or delivers to any other person, such other person shall have a lien thereon for any money or merchandise advanced, or negotiable security given by him, on the faith of such consignment, to or for the use of the person in whose name such consignment or delivery was made; and for any money, negotiable security, or merchandise, received for the use of the consignee by the person in whose name such consignment or delivery was made, if such consignee had, at the time of such advance or receipt, probable cause to believe that the person in whose name the merchandise was shipped, transmitted, or delivered, was the actual owner thereof, or had a legal interest therein to the amount of said lien.

When a consignee or factor having possession of merchandise with authority to sell the same, or having possession of a bill of lading, permit, certificate, or order, for the delivery of merchandise, with like authority, deposits or pledges such merchandise or any part thereof, or such document, with any other person as a security for money or merchandise advanced, or a negotiable instrument given by him upon the credit thereof, such other person, if he makes such loans, advances, and exchanges, in good faith and with probable cause to believe that the agent making the deposit or pledge had authority so to do, and was not acting fraudulently against the owner of such merchandise, shall acquire the same interest in and authority over such merchandise and documents as he would have acquired thereby if the agent had been the actual owner thereof, notwithstanding he had notice of such agency.

When such merchandise or document is accepted in deposit or pledge for an antecedent debt due from such consignee or factor, the person receiving the same shall thereby acquire no other or further right, or interest in, or authority over, or lien upon, the same than the consignee or factor might have enforced against the actual owner.

These provisions shall not affect the lien of a consignee or factor at law for the expenses and charges attending the shipment, transportation, and care of merchandise intrusted to

him; nor prevent the actual owner from recovering such merchandise from the consignee or factor previous to the pledge thereof, or from his assignees in case of his insolvency; nor prevent such owner from recovering any merchandise or document so deposited or pledged, upon tender of the money and restoration of the negotiable security or property so advanced to such consignee or factor, and upon tender of such further sum of money and restoration of such negotiable instrument or property as may have been advanced or given by the consignee or factor to the owner, or upon tender of a sum of money equal to the amount or value thereof, nor prevent him from recovering from the person with whom such merchandise may have been so deposited or pledged, any balance of money remaining in his hands as the proceeds of the sales thereof, after deducting the amount of the moneys or of the negotiable security so advanced thereon.[1]

Under the Massachusetts statute if a pledgee has knowledge that the pledgor is a factor or consignee and is pledging the goods of his principal for loans beyond the amount of his advances, and that he was not authorized to pledge them for loans beyond that amount, he is not protected as a holder for value beyond that amount.[2]

§ 337. **New York[3] and Ohio.[4]**—Every person in whose name

[1] A consignee or factor who deposits or pledges merchandise or a bill of lading, certificate, or order for the delivery of merchandise, consigned or intrusted to him as security for money borrowed, or a negotiable instrument received by him, or disposes of or applies the same to his own use in violation of good faith and with intent to defraud the owner thereof, or with the like fraudulent intent disposes of, or applies to his own use any money or negotiable instrument raised or acquired by the sale or other disposition of such merchandise, bill of lading, certificate, or order, shall be punished by fine not exceeding five thousand dollars, and imprisonment not exceeding five years. P. S. 1882, c. 203, § 75.

[2] Goodwin v. Massachusetts Loan & T. Co., 152 Mass. 189, 25 N. E. Rep. 100.

[3] Laws 1830, c. 179; 2 R. S. 1875, p. 1168, §§ 1-5; 3 R. S. 1882, p. 2257; 2 R. S. (Birdseye) 1896, p. 1239, §§ 1-5.

[4] 2 R. S. Annotated (Bates) 1897, §§ 3214-3218. The first factors' act in New York was passed in 1830. That in Ohio in 1844. See Cleveland v. Shoeman, 40 Ohio St. 176.

any merchandise shall be shipped shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon: 1. For any money advanced or negotiable security given by such consignee, to or for the use of the person in whose name such shipment shall have been made; and, 2. For any money or negotiable security received by the person in whose name such shipment shall have been made to or for the use of such consignee. The lien so provided for shall not exist where such consignee shall have notice, by the bill of lading or otherwise, at or before the advancing of any money or security by him, or at or before the receiving of such money or security by the person in whose name the shipment shall have been made, that such person is not the actual and *bona fide* owner thereof.

Every factor or other agent intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced or negotiable instrument or other obligation in writing given by such other person upon the faith thereof.[1]

Every person who shall hereafter accept or take any such merchandise in deposit from any such agent as a security for any antecedent debt or demand, shall not acquire thereby or enforce any right or interest in or to such merchandise or document, other than was possessed or might have been enforced by such agent at the time of such deposit.

Nothing contained in the foregoing provisions shall be con-

[1] See New York Security & Trust Co. v. Lipman, 157 N. Y. 551, 52 N. E. Rep. 595.

strued to prevent the true owner of any merchandise so deposited, from demanding or receiving the same, upon repayment of the money advanced, or on restoration of the security given on the deposit of such merchandise, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same; nor from recovering any balance which may remain in the hands of the person with whom such merchandise shall have been deposited as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit.[1]

It will be noticed that under this statute a pledgee, in dealing with an agent or factor, is not protected if he has knowledge that the factor is not the actual and *bona fide* owner of the goods pledged. If the factor or agent is rightfully in the possession of this principal's goods intrusted to him, his pledgee is protected, but if it happen that the agent or factor obtained possession of the goods by fraudulent means, his pledgee of such goods, knowing that he is dealing with an agent or factor, is not protected.[2] "The obvious meaning is," say the supreme court of New York, "that the factor or other agent who has been intrusted with certain documentary evidence of title, or with the possession and ostensible ownership of the property, shall be deemed the true owner, so far as may be necessary to protect those who have dealt with him upon the faith thereof, that is, upon the faith induced by the usual

[1] It is further provided in New York that every factor or agent who shall deposit any merchandise intrusted or consigned to him, or any document so possessed or intrusted as aforesaid, as a security for any money borrowed or negotiable instrument received by such factor or agent, and shall apply or dispose of the same to his own use, contrary to good faith, and with intent to defraud the true owner; and every factor or agent who shall sell any merchandise intrusted or consigned to him, in the like manner and with the like fraudulent intent; and every other person who shall knowingly connive with, or aid or assist, any such factor or agent in any such fraudulent deposit or sale, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine and imprisonment, at the discretion of the court in which such conviction shall take place. 3 R. S. 1881, p. 2258, § 7.

[2] Cartwright v. Wilmerding, 24 N. Y. 521; Stevens v. Wilson, 6 Hill 512; Howland v. Woodruff, 60 N. Y. 73.

indicia of title, that he was the true owner of the property. The second section of the British statute, which answers very nearly to the third section of our own, contains a proviso which expressly saves the rights of the true owner where the pledgee had notice that he was dealing with an agent, and our statute, though framed in a different manner, was evidently to produce the same result. It is impossible to suppose that the legislature intended to enable the factor to commit a fraud upon his principal, by pledging or obtaining advances upon the goods for his own purposes, when the pledgee or person making the advances knew that he was not dealing with the true owner.'"[1]

The factors' act has no application when a factor or agent has obtained goods which have been taken by a common-law larceny from the true owner.[2]

§ 338. **Pennsylvania.**[3]—Whenever any person intrusted with merchandise, and having authority to sell or consign the same, shall ship or otherwise transmit the same to any other person, such other person shall have a lien thereon: 1st. For any money advanced or negotiable security given by him on the faith of such consignment to, or for the use of the person in whose name such merchandise was shipped or transmitted. 2d. For any money or negotiable security received for the use of such consignee by the person in whose name such merchandise was shipped or transmitted. But such lien shall not exist for any of the purposes aforesaid, if such consignee shall have notice, by the bill of lading or otherwise, before the time of such advance or receipt, that the person in whose name such merchandise was shipped or transmitted is not the actual owner thereof.

Whenever any consignee or factor having possession of merchandise, with authority to sell the same, or having possession of any bill of lading, permit, certificate, receipt, or

[1] Stevens v. Wilson, 6 Hill 512.

[2] Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. Rep. 864, 48 Hun 537, 1 N.Y. Supp. 168.

[3] Brightly's Purdon's Digest 1873, p. 664; Brightly's Purdon's Digest 1894, p. 867. Act construed in Macky v. Dillinger, 73 Pa. St. 85.

order for the delivery of merchandise with the like authority, shall deposit or pledge such merchandise, or any part thereof, with any other person, as a security for any money advanced or negotiable instrument given by him on the faith thereof, such other person shall acquire, by virtue of such contract, the same interest in, and authority over, the said merchandise, as he would have acquired thereby, if such consignee or factor had been the actual owner thereof; provided, that such person shall not have notice by such document or otherwise, before the time of such advance or receipt, that the holder of such merchandise or document is not the actual owner of such merchandise.

If any person shall accept or take such merchandise or document from any such consignee or factor, in deposit or pledge for any debt or demand previously due by or existing against such consignee or factor, and without notice as aforesaid, and if any person shall accept or take such merchandise or document from any such consignee or factor, in deposit or pledge, with notice or knowledge that the person making such deposit or pledge is a consignee or factor only, in every such case, the person accepting or taking such merchandise or document in deposit or pledge, shall acquire the same right and interest in such merchandise as was possessed or could have been enforced by such consignee or factor against his principal, at the time of making such deposit or pledge, and no further or other right or interest.

Nothing in this act contained shall be construed or taken: 1st. To affect any lien which a consignee or factor may possess at law for the expenses and charges attending the shipment or transmission and care of merchandise consigned or otherwise intrusted to him. 2d. Nor to prevent the actual owner of merchandise from recovering the same from such consignee or factor, before the same shall have been deposited or pledged aforesaid, or from the assignees or trustees of such consignee or factor in the event of his insolvency. 3d. Nor to prevent such owner from recovering any merchandise so as aforesaid deposited or pledged, upon tender of the money, or of restora-

tion of any negotiable instrument so advanced or given to such consignee or factor, and upon tender of such further sum of money or of restoration of such other negotiable instrument, if any, as may have been advanced or given by such consignee or factor to such owner, or on tender of a sum of money equal to the amount of such instrument. 4th. Nor to prevent such owner from recovering from the person accepting or taking such merchandise in deposit or pledge, any balance or sum of money remaining in his hands as the produce of the sale of such merchandise after deducting thereout the amount of money or the negotiable instrument so advanced or given upon the security thereof as aforesaid.[1]

§ 339. **Rhode Island.**[2] — The consignee of merchandise shipped shall have a lien thereon for any money or negotiable security by him advanced upon the faith of such shipment to, or for the use of, the person in whose name the shipment shall have been made, in the same manner, and to the same extent, as if such person were the true owner thereof; provided, at the time of the advance the consignee shall have had no notice or knowledge that the shipper was not the true owner of such merchandise.

Every person intrusted with and in the possession of goods for the purpose of sale, or if any bill of lading, receipt or certificate of a warehousekeeper or inspector, or of any warrant

[1] If any consignee or factor having the possession of merchandise with authority to sell the same, or having possession of any bill of lading, permit, certificate, receipt or order for the delivery of merchandise with the like authority, shall deposit or pledge such merchandise or document, consigned or intrusted to him as aforesaid, as a security for any money borrowed or negotiable instrument received by such consignee or factor, and shall apply or dispose of the same to his own use, in violation of good faith, with intent to defraud the owner of such merchandise, and if any consignee or factor shall, with like fraudulent intent, apply or dispose of to his own use any money or negotiable instrument, raised or acquired by the sale or other disposition of such merchandise, such consignee or factor in every such case shall be guilty of a misdemeanor, and be sentenced to pay a fine not exceeding two thousand dollars, and undergo an imprisonment not exceeding five years. Brightly's Purdon's Dig. 1873, p. 349, § 178.

[2] G. S. 1872, p. 261, c. 123; P. S. 1882, c. 136; G. L. 1896, c. 158.

or order for the delivery of goods, shall be deemed the true owner of the goods so by him possessed, or described in either of said instruments in favor of the purchaser or pledgee of such goods, for money or negotiable security; provided, that such purchaser or pledgee at the time of payment or advance as aforesaid, shall have had no notice or knowledge that the possessor of such goods or instrument was not the true owner of such goods by him possessed, or in such instrument described.

Nothing in the preceding section shall be construed to authorize a common carrier, warehousekeeper, or other person to whom merchandise or other property may have been committed for transportation or storage only, to sell or pledge the same; nor shall any person taking in deposit or pledge merchandise or goods described in either of the instruments therein mentioned, from any agent for sale, warehousekeeper or inspector, for an antecedent debt, be entitled to any greater interest in such goods or instrument than was possessed by such agent, warehousekeeper or inspector at the time of such deposit or pledge.

All purchases and contracts for the purchase of goods made with, and all payments for goods made to, any agent intrusted therewith, or with or to the consignee thereof in the ordinary course of business, shall bind the owner of such goods in favor of the purchaser, contractor or payee, though knowing of the agency or consignment; provided he had at the time of such purchase, contract or payment, no notice or knowledge that such agent or consignee was not authorized to sell or receive payment for such goods.

Nothing herein contained shall be construed to prevent the true owner of any goods shipped, intrusted, deposited, or pledged as hereinbefore described, from demanding the same from his factor, agent or consignee before the same shall have been so sold, contracted to be sold, deposited or pledged; nor to prevent such owner from demanding and receiving from any such purchaser the sum agreed to be paid for the purchase

of such goods, subject to any right of set-off on the part of such purchaser against such agent or factor; nor to prevent any such owner from demanding and recovering such goods from any person with whom the same may have been so deposited or pledged as a security for any money or other property advanced, or any negotiable security or obligation in writing given as aforesaid, upon repayment of such money, or restoration of such other property, and satisfaction of such security or obligation in writing so advanced, together with such further sum as shall, with the amount so advanced by such depositary or pledgee, be equal to the money or other property and security or obligation in writing, if any, advanced by such agent or factor to such owner, or to the amount for which such agent or factor has a lien on the same goods; nor to prevent such owner from recovering from such depositary or pledgee any balance or sum of money remaining in his hands as the produce of the sale of such goods, after deducting thereout the amount of the money or other property or security in writing so advanced; and the amount so set off and retained by such purchaser, or paid by such owner on redeeming such goods, or in any manner allowed by him on recovering the same or the produce of the sale thereof, shall be deemed and taken as so much paid by him to and for the use of such agent or factor.[1]

§ 340. **Wisconsin.**[2]—Every consignee of property shall have a lien thereon for any money advanced or negotiable security given by him to or for the use of the person in whose name the shipment of such property is made, and for any money or

[1] Every agent or factor who shall deposit or pledge any goods, wares or merchandise, or any bill of lading, receipt, or certificate of a warehouse-keeper or inspector, or any warrant or order for the delivery of goods with which he shall have been intrusted, or which shall have been consigned to him as a security for any money or other property borrowed or received by such agent or factor, and shall apply or dispose of the proceeds thereof to his own use, in violation of good faith, and with intent to defraud any such owner of such goods, shall be deemed and taken to be guilty of a misdemeanor and shall be fined not exceeding one thousand dollars, or be imprisoned not exceeding five years. G. S. 1872, p. 546, § 19; P. S. 1882, c. 242, § 20.

[2] R. S. 1898, §§ 3345–3347.

negotiable security received by such person for his use, unless he shall, before advancing any such money, or giving such security, or before it is so received for his use, have notice that such person is not the actual owner thereof.

Every factor, broker or other agent intrusted by the owner with the possession of any bill of lading, custom-house permit, warehouse receipt, or other evidence of the title to personal property, or with the possession of personal property for the purpose of sale, or as security for any advances made or liability by him incurred in reference to such property, shall have a lien upon such personal property for all such advances, liability incurred, or commissions or other moneys due him for services as such factor, broker or agent, and may retain the possession of such property until such advances, commissions or moneys are paid, or such liability is discharged.[1]

Every person having a lien given by either of the above provisions, or existing in favor of any bailee for hire, carrier, warehouseman or pawnee, or otherwise by the common law, may in case such debt remain unpaid for three months, and the value of the property affected thereby does not exceed one hundred dollars, sell such property at public auction, and apply the proceeds of such sale to the payment of the amount due him, and the expenses of such sale. Notice in writing of the time and place of such sale, and of the amount claimed to be due, shall be given to the owner of such property personally, or by leaving the same at his place of abode, if a resident of this state, and if not, by publication thereof once in each week for three weeks successively, next before the time of sale, in some newspaper published in the county in which such lien accrues, if there be one, and if not, by posting such notice in three public places in such county. If such property exceed in value one hundred dollars, then such lien may be enforced against the same by action in any court having jurisdiction.

[1] This statute applies to receipts given by private warehouses, and not merely to bonded warehouses. In this respect the statute is construed differently from the New York statute from which that of Wisconsin was taken; for in the latter state there are no bonded warehouses. Price v. Wisconsin Marine & Fire Ins. Co., 43 Wis. 267.

§ 341. **So far as the factors' acts have not changed the law,** the common law rule still prevails; and a factor holding the goods of another, even with documentary evidence of title, has no power to pledge them, unless such power has been conferred upon him by the owner.[1] Even under the factors' act an agent has no power to pledge goods in his possession, unless they have been intrusted to him for the purpose of sale. To make the pledge of an agent in possession of goods valid, he must have had at the time of the pledge power to sell them. Authority subsequently given him by his principal to sell the goods, without knowledge of the pledge, will not make the title of the pledge valid.[2] The effect of the factors' acts will not be extended beyond their terms.

A mere consignee who is not a factor, and has not possession of the goods, nor any *indicia* of title, can not pledge them. Thus, if a consignee, having only a letter of instruction from the owner, "to keep these consignment goods as such—as my property until sold, and well insured," obtains a loan upon a pledge of the goods from one who is ignorant of the letter, and makes no inquiry concerning the ownership of the pledgor or his authority over the goods, the pledgee can not hold them as against the owner.[3]

§ 342. **At common law a factor could not make a pledge by indorsement and delivery of a bill of lading** or other document of title representing his principal's goods, although the indorsee was ignorant of the fact that he held the goods as a factor or agent to sell.[4] He could not pledge them unless his principal had given him such authority over them that he could deal with them as his own.[5]

[1] Patterson v. Tash, 2 Stra. 1178; Daubigny v. Duval, 5 T. R. 604; Lamb v. Attenborough, 1 Best & S. 831; First Nat. Bank v. Shaw, 61 N. Y. 283; Barnard v. Campbell, 55 N. Y. 456.

[2] Nickerson v. Darrow, 5 Allen (Mass.) 419.

[3] Chicago Taylor Printing Press Co. v. Lowell, 60 Cal. 454, 9 Pac. Coast L. J. 498.

[4] Newsom v. Thornton, 6 East 17; Martini v. Coles, 1 M. & S. 140; Guichard v. Morgan, 4 Moore 36.

[5] Boyson v. Coles, 6 M. & S. 14; Michigan State Bank v. Gardner, 15 Gray (Mass.) 362.

The rule is otherwise under statutes which give to bills of lading a negotiable character; or under statutes which make special provision for the protection of indorsees of factors in possession of bills of lading, with power to sell the goods; but under the factors' acts, an agent who is not authorized to sell the goods represented by a bill of lading or warehouse receipt in his possession can not pledge the goods by a transfer of such documentary title.[1]

The statute of Missouri on this subject makes a warehouse receipt or bill of lading transferable by indorsement and declares the transferee to be the owner of the goods "so far as to give validity to any pledge, lien or transfer" made on the faith thereof, but at the same time impliedly restricts any pledge which a factor can make of such receipt or bill of lading to the case of a pledge for the amount of his advances and charges, or to one authorized in writing by his consignor.[2] Judge Treat, delivering the opinion of the court to this effect, said: "It may be urged that a practical difficulty will arise in ascertaining the correct amount of advances and charges; but if that be so, the consignor may reply with greater force that his property ought not to be pledged for more than the factor's lien thereon. The pledgee is not obliged to loan money and receive the pledge as collateral. If he is willing to lend to the factor he can receive as collateral a warehouse receipt to the extent that the factor has a lien on the goods represented; in other words, the factor can pledge what belongs to him,—his lien,—and not his principal's interest or rights of property. This may be questionable legislation, inasmuch as it enables the pledgee to sell the goods if not redeemed, instead of the agent, in whose personal skill and judgment alone the consignor confided. * * * If a stranger will take a pledge of goods from a factor without inquiry, the consignor is not to suffer. Whether he knows or not that the person from whom he takes the pledge is a mere factor does not change the rule. A consignor's property can not be taken from him without his consent. A pledgee

[1] Stollenwerck v. Thacher, 115 Mass. 224.

[2] Steiger v. Third Nat. Bank, 6 Fed. Rep. 569, 577.

is bound at his peril to inform himself of the facts. The rule as to sales in the ordinary course of business is one thing, and as to pledges entirely different. * * * The factor can not pledge the goods of his principal, except to the amount and in the manner stated. He has no authority, either at common law or by statute, to borrow money generally on the pledge of the warehouse receipt; nor can the pledgee protect himself against the demand of the consignor, except to the extent of such advances and charges. The pledgee may receive a transfer of the factor's lien, and nothing more."

§ 343. **A factor has power to pledge a bill of lading or warehouse receipt made negotiable by statute,** where he has taken the receipt in his own name, and indorsed it, so that one dealing with him on the faith of his apparent legal title will acquire a good title as against the principal; and notice to the pledgee that the factor holds the receipt for his principal, is not notice of any limitation of his power to pledge it; though a pledge of it would not bind the principal if the pledgee had notice that the pledge was made in violation of the principal's instructions.[1] In great commercial communities the rules of the common law with reference to pledges by factors have gradually yielded to the necessities of modern trade and new methods of conducting business. But legislation has been necessary to effect a change of the law, and so strong has been the judicial preference for the rules of the common law that the legislation intended to change them has sometimes been construed so as to defeat the object intended to be accomplished by it. But in England, and in several of the more important commercial states of our own country, legislation has effected an important change in respect to the powers of factors, in favor of persons dealing with them in good faith. The rule has become quite generally established that a factor intrusted with the insignia of title, may sell or pledge the property and effectually bind his principal. In reference to warehouse re-

[1] Price v. Wisconsin Marine & Fire Ins. Co., 43 Wis. 267; Rice v. Cutler, 17 Wis. 351, 84 Am. Dec. 747; Cleveland v. Shoeman, 40 Ohio St. 176.

ceipts, legislation has in several states in another way protected *bona fide* holders of such receipts, and that is by making them negotiable, with the qualities of negotiable paper.

§ 344. **An agent not intrusted by his principal with the power to sell is not a factor within the factors' acts.**[1] A tobacco manufacturer bought of a dealer in tobacco a large quantity of tobacco, then lying in bond in the latter's name. The price was paid, but the tobacco was allowed to remain in the dock, to be forwarded as the purchaser might want it for the purposes of his business, with an understanding that the tobacco was to be cleared by the seller, and dispatched to the purchaser free of any charge for commission, the latter remitting to the seller the amount of the duty and dock charges. This was the usual way of dealing in the tobacco trade. For this purpose the tobacco was allowed to remain in the name of the seller in the dock books, and he retained the dock-warrants. The seller afterwards representing the tobacco to be his own property, pledged it as security for a loan, handing to the pledgee the dock-warrants, and causing the tobacco to be transferred to the pledgee's name in the dock-books. The seller shortly afterwards absconded, and was adjudged bankrupt. The purchaser demanded the tobacco of the pledgee, who claimed to retain it, either on the ground that the purchaser had armed the pledgor with an ostensible authority to deal with the goods as his own, or that he was intrusted with the tobacco, or the documents of title, with authority to pledge or sell it within the factors' acts. But it was held that the pledgor was not intrusted with the tobacco, as factor or agent, for sale, but only to clear and forward it to the purchaser when required, and, consequently, that he had no authority to sell or to pledge it; and it was further held, that, looking at the usage of the trade, the

[1] Cole v. North Western Bank, L. R. 9 C. P. 470; affirmed, L. R. 10 C. P. 354; Fuentes v. Montis, L. R. 3 C. P. 268; affirmed, 4 C. P. 93; Monk v. Whittenbury, 2 B. & Ad. 484; Cartwright v. Wilmerding, 24 N. Y. 521, 528; Nickerson v. Darrow, 5 Allen (Mass.) 419; Stollenwerck v. Thacher, 115 Mass. 224.

plaintiff had not given any ostensible authority to the pledgor to pledge the tobacco.[1]

This decision was affirmed on appeal,[2] Chief Justice Cockburn, in delivering judgment, saying: "The case for the plaintiff rests on the general proposition of law,—which, as a general proposition can not be contested,—that the mere possession of the property of another, without authority to deal with the thing in question otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter party may have been." After referring to several cases,[3] which at first sight appear to favor the view that the plaintiff, by leaving the possession of the goods in the hands of the seller, had enabled him to pledge them as his own, and therefore was estopped from denying his right so to deal with them, the learned judge continued: "Sitting here in a court of appeal, I feel myself at liberty to say that these authorities fail to satisfy me that, at common law, the leaving by a vendee of goods bought, or the documents of title, in the hands of the vendor till it suited the convenience of the former to take possession of them, would, on a fraudulent sale or pledge by the party so possessed, divest the owner of his property or estop him from asserting his right to it. If this had been so, there would have been, as it seems to me, no necessity for giving effect by statute to the authorized sale of goods by a factor."

§ 345. **An agent who can pledge or sell under the factors' acts must be one whose business properly ends in a sale of**

[1] Johnson v. Crédit Lyonnais, 2 C. P. D. 224.

[2] 3 C. P. D. 32.

As soon as this decision appealed from was made public, the legislature, by statute (40 & 41 Vict., c. 39), at once proceeded to settle the law to the contrary, by applying the protection given by the factors' acts to persons acquiring title from agents, to innocent parties purchasing or making advances in such cases as the present.

[3] Pickering v. Busk, 15 East 38; Boyson v. Coles, 6 M. & S. 14; Dyer v. Pearson, 3 B. & C. 38.

goods, or in receiving payment therefor. If an agent of this kind is intrusted in that capacity with goods, he can make an effectual pledge of them, in the absence of bad faith on the part of the pledgee. Thus, a merchant in London agreed with a tanner in Canada to pay him a stipulated price for tanning hides to be forwarded to him by the merchant, and to be sent back to him when tanned. The merchant accordingly sent him a large number of hides, which he tanned, and then pledged to the Toronto Bank for advances obtained on his own account, the bank acting in ignorance of the above agreement. The merchant having tendered the amount due the tanner under the agreement, brought suit against the bank to recover possession of the goods. The defense was that the tanner carried on the business of a factor, warehouseman, and consignment agent as well as that of a leather tanner, and that in the former character he had pledged the goods in question. The construction of the contract depended upon Canadian law, and the factors' clause of the Canadian Code, which contains some peculiar provisions; but the House of Lords held that, under the circumstances of the case, the tanner could not, under any law, English or Canadian, claim to be a factor or agent of the merchant, entitled to pledge his goods, and that, consequently, the bankers could not set up any title to the goods, as derived from him, against the merchant who was the real owner.[1] The Lord Chancellor in delivering judgment said: "It is admitted that, as long as the tanning operation was going on, there was no agency at all within the meaning of these factors' clauses. But it is contended, that because the tanner, who had a lien on the goods for his labor, also undertook to procure freights and send the leather home, which he did, taking for his own security bills of lading made out in his name, which he sent to his agents in Liverpool, this made him, in that stage of the transaction, after the tanning was done, and when he was sending

[1] City Bank v. Barrow, L. R. 5 App. Cases 664.

The case of Cole v. North Western Bank, L. R. 9 C. P. 470, affirmed L. R. 10 C. P. 354, was referred to and approved by Lord Blackburn, delivering a confirmatory opinion.

the goods home under his contract to the owner in England, an agent withing the meaning of these factors' clauses. My Lords, it appears to me that such a view of the word 'agent' would be directly at variance with the authorities, which, as far as I can see, are for this purpose quite as applicable upon the construction of the words in the Canadian Code as upon the construction of the corresponding words in the English Acts. The authorities are thus summed up by Mr. Justice Willes in the case of Heyman v. Flewker.[1] He says, after referring to certain cases: 'All that these cases decide applicable to the present purpose may be stated thus: that the term "agent" does not include a mere servant or caretaker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party, but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the act has taken its name.' "

A person intrusted with furniture to store in his own house, though in one sense an agent of the owner, is not an agent within the meaning of the factors' act, who can make a good pledge of the property.[2] A clerk who is in possession of delivery orders belonging to his employer is not an agent so intrusted with goods, or with the documentary title to them, that he can make a valid pledge of them.[3]

§ 346. **One is not by virtue of his general employment as a broker authorized to pledge goods intrusted to him in another capacity.** Thus, if one who is a broker, and is usually employed to sell goods, also carries on an independent business as a warehousekeeper, and he is intrusted with goods for the purpose of warehousing only, he is not "intrusted" with them as an agent within the meaning of the factors' act.[4] Mr. Jus-

[1] 13 C. B. (N. S.) 519; 32 L. J. (C. P.) 132.

[2] Wood v. Rowcliffe, 6 Hare 183.

[3] Lamb v. Attenborough, 1 B. & S. 831.

[4] Cole v. North Western Bank, L. R. 9 C. P. 470; affirmed on appeal 10 C. P. 354, 372.

tice Blackburn, in delivering judgment upon appeal with reference to the purpose of the factors' act, said: "We do not think that it was wished to make the owner of goods lose his property, if he trusted the possession to a person who in some other capacity made sales, in case that person sold them. If such was the wish of those who framed the act, we think they have not used language sufficient to express an intention so to enact."

Thus, where a consignee of wool for sale intrusted it to another as a warehouseman for the purposes of sale, and with authority as broker to receive offers for and to negotiate sales of the same, to be reported to and settled by the consignee, but with no authority to make and conclude sales himself, it was held that he could not make a valid pledge of the wool for his own purposes; for he was neither a "factor or other agent intrusted with the possession of merchandise for the purpose of sale," nor "a person intrusted with merchandise and having authority to sell or consign the same," within the meaning of the factors' act.[1] The supreme court of Massachusetts so deciding said:[2] "A warehouseman, who is also a broker with authority only to receive offers for merchandise stored with him as a warehouseman and report them to his principal, who concludes the sale, if any is made, is not within the provisions of either of these sections." A pledge made by such warehouseman without any authority from the consignee and without any acts done by the plaintiff, whereby the pledgee was misled into the belief that the pledgor had any such authority, whether as owner or otherwise, is invalid. The fact that the pledgee found the wool in the pledgor's store, which he knew was used by the pledgor "to store wool as a warehouseman for other persons, and also wool belonging or consigned to himself," does not bring the case within the decisions upon ostensible or apparent ownership. Neither the railroad receipt nor the invoice was delivered to the pledgor, but both were retained

[1] G. S. of Mass. 1860, c. 54, §§ 2, 3, P. S. 1882, c. 71, §§ 1, 3.

[2] Thacher v. Moors, 134 Mass. 156, Mass. Law Rep., Apr. 19, 1883.

by the consignee, and the pledgor, so far as it appeared to the pledgee, was no more the ostensible owner of this wool than of any other wool stored with him as warehouseman. The assertion of the pledgor that he owned the wool was incompetent as evidence of ownership against the consignee, and could not enlarge the pledgor's authority as agent.[1] In a suit by the consignee against such pledgee for a conversion of the wool, it was further held that the consignee's rights were not affected by the fact that the pledgor was, without the knowledge of the consignee, a general owner of the property. The wool was originally bought by another person, upon joint account with the pledgor under an arrangement between them by which the former bought the wool of farmers in Vermont with money furnished by the pledgor, who was to have control of the sale of it, and the profits were to be divided between them. Under this arrangement the pledgor procured the advances from the consignee, and furnished other money of his own with which to pay for the wool. Under the circumstances the pledgor was regarded as estopped by his acts from setting up against the plaintiff any title to the wool inconsistent with the validity of the lien acquired by the plaintiff as consignee. "The plaintiff's interest in the merchandise," say the court,[2] "was that of a consignee for sale who had made advances upon it, and his rights and duties in most respects are well defined in the law. The possession of a warehouseman, although he has a lien for his charges, is not inconsistent with the possession of the consignee, and it is in accordance with the usage of commission merchants to store merchandise consigned to them in warehouses. A consignee's rights in the merchandise are not lost by putting the merchandise in the warehouse of another person to be stored until it can be sold. The plaintiff never intended to relinquish his lien, or even to put the property into the possession of the owner; but it is argued that, as he did intend to put it into the posses-

[1] Thacher v. Moors, 134 Mass. 156, per Field, J., substantially in his language.

[2] Thacher v. Moors, 134 Mass. 156, per Field, J.

sion of the pledgor, who was the owner, although he did not know it, this union of possession and general property in the pledgor enabled him to convey a good title to an innocent pledgee for value. No decided case has gone so far as this. To hold that the union of possession and general property in the same person, however acquired, necessarily destroys the special property of a consignee of merchandise, would enable warehousemen who hold merchandise in store for commission merchants to buy in the title of their consignors, and thus obtain full control over the disposition of the merchandise stored, without the authority or knowledge of the consignees. The plaintiff can not be held to have intended that the pledgor should exercise any of the rights of ownership over the merchandise on account of his delivery of it to him, because he did not know that he was an owner; and it was not a consequence naturally to be expected from delivering the merchandise to him to be stored, that it would come into the possession of the general owner; and in no legal sense can the plaintiff be said to have voluntarily delivered the merchandise into the hands of the general owner."

§ 347. **An agent whose authority to sell has been revoked** was not within the former factors' acts of England, "intrusted with and in the possession of goods, or of the documents of title to goods." He could not make a valid pledge of goods which had been intrusted to him for sale, but which he had wrongfully retained against the will of his principal.[1] But under the recent factors' act[2] the revocation of authority does not prejudice the rights of *bona fide* purchasers without notice.

§ 348. **The statutes apply only where the relation of principal and factor or agent exists** between the real owner of the bill of lading and the person having the bill in possession; where the latter obtains the bill by or with the consent of the owner, and where the factor is made the consignee. Moreover

[1] Fuentes v. Montis, L. R. 3 C. P. 268; affirmed L. R. 4 C. P. 93.

[2] 40 and 41 Vict., c. 99, § 3.

they apply only where the third person who has advanced money to the factor or agent, has done so on the faith of such bill of lading.[1]

One who is intrusted with the lawful evidence of title to merchandise, to enable him to sell it and remit the proceeds, becomes an agent, within the meaning of the Factors' Act; and the fact that he is called a trustee in a secret agreement under which he is intrusted with the evidence of ownership does not make him a trustee as to the third parties having no notice of the agreement.[2]

These acts have no application in cases where either goods or documents of title have been obtained from the owner by fraud, for the trickster is not "an agent intrusted with the possession."[3] But if the owner has in fact intrusted goods or the documents of title to one as his agent to sell, though he has been induced to do so by fraud, a pledge by the agent is good.[4]

§ 349. **The relation of principal and factor is not created by the mere possession of a bill of lading** in the name of a third person, though that circumstance may raise a presumption of such relation. The fact of the relation is to be proved *aliunde.*[5] In this as in other cases while possession is *prima facie* evidence of ownership, yet anyone dealing with a person in possession of personal property upon the mere evidence which possession affords, takes upon himself the risk that the property really belongs to another; and the burden rests upon him to prove that the true owner had authorized the person in possession to sell or pledge the property.[6] "It is hardly nec-

[1] First Nat. Bank v. Shaw, 61 N. Y. 283.

[2] New York Security & T. Co. v. Lipman, 157 N. Y. 551, 52 N. E. Rep. 595.

[3] Kingsford v. Merry, 1 H. & N. 503; Hardman v. Booth, 1 H. & C. 803.

[4] Sheppard v. Union Bank, 7 H. & N. 661; Baines v. Swainson, 4 B. & S. 270. See, in this connection, Vickers v. Hertz, L. R. 2 H. L. Sc. 113, and remarks upon it by Blackburn, J., in Cole v. North Western Bank, L. R. 10 C. P. 354, 374.

[5] First Nat. Bank v. Shaw, 61 N. Y. 383; Cook v. Beal, 1 Bosw. (N. Y.) 497.

[6] Moore v. Robinson, 62 Ala. 437, per Stone, J.; Barnard v. Campbell, 55 N. Y. 456.

essary to say that the title of the true owner of personal property can not be impaired by the unauthorized acts of one not the owner. Taking possession of the property, shipping it, obtaining bills of lading from the carriers, indorsing away the bills of lading, or even selling the property and obtaining a full price for it, can have no effect upon the right of the owner. Even a *bona fide* purchaser obtains no right by a purchase from one who is not the owner, or not authorized to sell.'"[1] Possession of a bill of lading does not constitute title, nor does it of itself affect the operation of the general rule that property in chattels can not be transferred except by the owner or by one having authority from him.[2]

If, therefore, an intermediate consignee named in a bill of lading having power simply to receive and forward the property, without authority issues a new bill of lading to one not the consignee named in the original bill, the person so receiving such new bill does not thereby become the factor or agent of the owner, and the title of the latter is not affected by any contract made by such holder of the bill of lading for advances made on the faith of it.[3]

Accordingly, if the owner of cotton authorize a person to

[1] The Idaho, 93 U. S. 575, 583, per Strong, J.

[2] Barnard v. Campbell, 55 N.Y. 456.

[3] First Nat. Bank v. Shaw, 61 N. Y. 283, 304. "Considerable stress was laid at the argument, by counsel on either side of the case on the great consequences to commerce of a decision in this cause adverse to their respective views. Finding the principles of law clearly settled, we are bound to administer them as they have come down to us from our predecessors. We, however, believe that a decision can not, on the whole, be adverse to commercial interests which, while it recognizes the convenience of merchants and the great value and importance of the factors' act, requires of those who advance money on commercial documents the observance of reasonable diligence and the obligation to make reasonable inquiry, and enables owners of property on the great transportation lines of inland commerce to secure it from the frauds and depredations of mere custodians and bailees in whom no special confidence is reposed. While commercial convenience must be respected, the rights of property must not be sacrificed. * * * The true interests of commerce demand that the claims under bills of lading and other such instruments should be scrupulously protected, since commerce will not flourish where the rights of property are not respected." Per Dwight, C.

In Louisiana[1] the code provides that every lawful obligation may be enforced by the auxiliary obligation of pledge. If the principal obligation be conditional, that of the pledge is confirmed or extinguished with it. If the obligation is null, so also is the pledge. The obligation of pledge annexed to an obligation which is purely natural, is rendered valid only when the latter is confirmed and becomes executory. Pledge may be given, not only for an obligation consisting in money, but also for one having any other object; for example, a surety. Nothing prevents one person from giving a pledge to another for becoming his surety with a third. A person may give a pledge, not only for his own debt, but for that of another, also.

One who pledges property as security for the obligation of another, can not withdraw the property pledged otherwise than as a pledgor for himself might; and, if he receives from the debtor a consideration for the pledge, he can not withdraw it without his consent.[2]

But where a stockholder in a corporation pledged his stock to another person to secure the payment of a debt due by the corporation, it was held that he might withdraw the stock pledged, even against the objection of the corporation.[3]

§ 355. **The debt secured by a pledge is determined by the contract of the parties.** The particular contract determines their rights. The debt secured may be one already existing, one arising at the time of the transaction, or one to arise in the future. The mere existence of a previous debt from the pledgor to the pledgee does not make the pledge a security for that debt, if the agreement upon which the pledge was made was that it should secure a debt created at the time, or one to arise

[1] R. Civil Code 1870, p. 373, 2 R. Civ. Code 1900, arts. 3136–3141.

[2] So by statute in *California*, Codes and Stats. 1876, § 7994 of Civ. Code, § 2994; and in *North Dakota*, R. Codes 1895, § 4752, of Civ. Code; Enochs v. Newton, 65 Miss. 86, 3 So. Rep. 141.

[3] German State Bank v. Northwestern Water & Light Co., 104 Iowa 717, 74 N. W. Rep. 685.

from future advances.[1] On the other hand, a pledge made for a definite loan made at the time, can not be held as security for an antecedent debt, nor for advances which the pledgee may afterwards make to the pledgor, unless it be agreed that the security shall be so applied.[2]

Thus, where one pledges goods for the repayment of a sum of money borrowed, and afterwards pledges another lot of similar goods to the same person for another loan, if there is nothing to show that either pledge was dependent upon the other, or that when the first pledge was made a future loan was anticipated, or that when the second loan was made the first was alluded to, each pledge is a security for the loan made at the time, and not in any respect for the other loan.[3]

§ 355a. **A pledge ordinarily secures any renewal of the debt.** When a promissory note secured by a pledge becomes due and a new note is given in renewal, the pledge remains as security for the new note, in the absence of anything showing that the parties intended that the original debt should be regarded as paid or discharged. When it appears that it will be for the benefit of the creditor that the old debt should be kept alive, the presumption of payment, by the taking of a new note for the old note, does not arise, and the original debt is not discharged.[4]

§ 355b. **When collateral security is equally given for various debts, the pledgee may hold and apply the security to the payment of any of the debts secured.** Thus, where one was indebted to a bank for several loans made at different times, and at the times when two of the loans were obtained he pledged

[1] Baldwin v. Bradley, 69 Ill. 32; Jarvis v. Rogers, 15 Mass. 389; Allen v. Megguire, 15 Mass. 490.

[2] Wilcox v. Fairhaven Bank, 7 Allen 270; Hathaway v. Fall River Nat. Bank, 131 Mass. 14; James's Appeal, 89 Pa. St. 54; Robinson v. Frost, 14 Barb. (N. Y.) 536; Ball v. Stanley, 5 Yerg. (Tenn.) 199; Phillips v. Thompson, 2 Johns. Ch. 418; Divver v. McLaughlin, 2 Wend. (N. Y.) 596.

[3] Baldwin v. Bradley, 69 Ill. 32.

[4] Cotton v. Atlas Nat. Bank, 145 Mass. 43, 12 N. E. Rep. 850.

certain notes as collateral security under an agreement declaring, "that for the punctual payment of this or any other sum which I have obtained, or may hereafter obtain, on loan or discount from said bank, these notes are hereby pledged and made liable; and the directors of said bank are hereby authorized, after said loan or loans have become due and payable, and shall remain unpaid, to sell the said notes," it was held that the bank was under no obligation first to apply the security to the payment of the loan obtained when the security was given, that the language of the contract could not be construed as giving a preference or priority to any particular debt, and that the creditor had a right to apply the proceeds of the security as he saw fit.[1] And so if shares of stock are pledged to a bank by the maker of a promissory note given in renewal of earlier notes, "as collateral security for the payment of this note, or any of my liabilities to said bank, due or to become due, now or hereafter contracted or incurred," with authority "on the non-payment of this note or any other of the liabilities above mentioned" to sell the stock, the proceeds above all sums due to the bank, including its expenses, to be credited to such maker, no special pledge of the stock exists for the payment of the note above any other indebtedness of the maker to the bank at the time of a lawful sale thereof.[2]

§ 356. **The mere existence of another debt from the pledgor to the pledgee, does not authorize the latter to detain the pledge** for that debt, when the debt or trust which it was put into his hands to secure has been discharged, unless there be some just presumption that such was the intention of the parties.[3] When

[1] Richardson v. Washington Bank, 3 Met. 536.

[2] Fall River National Bank v. Slade, 153 Mass. 415, 26 N. E. Rep. 843.

[3] Jarvis v. Rogers, 15 Mass. 389; Baldwin v. Bradley, 69 Ill. 32; Adams v. Sturges, 55 Ill. 468; Teutonia Nat. Bank v. Loeb, 27 La. Ann. 110; St. John v. O'Connel, 7 Port. (Ala.) 466; Schiffer v. Feagin, 51 Ala. 335; Gilliat v. Lynch, 2 Leigh (Va.) 493; Niles v. Edwards, 90 Cal. 10, 27 Pac. Rep. 159; Masonic Savings Bank v. Bangs, 84 Ky. 135.

the contract of pledge is not in writing, the debt secured is determined by the verbal contract of the parties or the circumstances of the transaction. If this contract, expressly made or implied from the circumstances, connects the pledge with a particular debt, another debt, whether prior or subsequent, can be made to share in the security by a like contract, but only upon proof of such a contract.

A creditor can not, upon payment of the debt for which he holds a pledge, retain the pledge as security for a prior or other debt.[1] He has no lien upon specific articles of personal property of his debtor which happen to be in his hands. To obtain a lien upon them, except through an agreement with his debtor, he must attach them for his debt, just as any other creditor would.[2] If a negotiable note be indorsed by the payee to a bank, as collateral security for one only of several demands on which he is liable, the bank has no lien on such note for any other demand against such debtor. If the bank bring suit against the maker of such note, after the demand for which it was pledged has been paid, the maker, acting under the authority of the indorser, may successfully defend against the right of the bank to recover.[3]

§ 357. **A general lien for a balance of account upon collaterals pledged** for a specific loan can not be claimed in the absence of an express agreement or general usage.[4] If there

[1] Cowling v. Beachum, 7 Moore 465; De Bernales v. Fuller, 14 East 590, note; Hathaway v. Fall River Nat. Bank, 131 Mass. 14; Jarvis v. Rogers, 15 Mass. 389; Hall v. Marston, 17 Mass. 575; Robinson v. Frost, 14 Barb. (N. Y.) 536; M'Neilly v. Richardson, 4 Cow. (N. Y.) 607; Duncan v. Brennan, 83 N. Y. 487; Wyckoff v. Anthony, 90 N. Y. 442, 9 Daly (N. Y.) 417, 27 Alb. L. J. 94; Baldwin v. Bradley, 69 Ill. 32.

This rule applies as well in cases in which the United States, or one of its revenue officers, is pledgee, as in cases between individuals. Broughton v. United States, 12 Ct. Claims 330; State Nat. Bank v. United States, 10 Ct. Claims 519, 545.

[2] Allen v. Megguire, 15 Mass. 490.

[3] Neponset Bank v. Leland, 5 Met. (Mass.) 259.

[4] Vanderzee v. Willis, 3 Bro. C. C. 21; Davis v. Bowsher, 5 T. R. 488; *In re* Medewe's Trust, 26 Beav. 588; Jarvis v. Rogers, 15 Mass. 389; Lane

be a usage giving to persons engaged in discounting, buying, advancing on, or selling bills or notes, a lien for a general balance against their customer, such usage should be proved. Courts have taken notice, judicially, of the lien of bankers who are strictly such, and who are dealers in money; but even the lien of a banker does not exist in any case where the circumstances are inconsistent with such a lien.[1] "When there is no right to detain the possession of the collateral, after a specific loan upon it is paid, there can be no lien upon it after payment of the loan. The right of the debtor to pay the advance and take up a collateral before maturity, is not reconcilable with a right in the creditor to hold on after payment for any general balance. A right of possession is an essential ingredient to a lien upon personal property."[2]

§ 358. **But of course security taken for a specific loan may by agreement of the parties be made to cover other loans** made at other times.[3] The fact that a subsequent loan was made upon the security of the same collaterals already held by the creditor for a previous loan, may be shown not merely by the written contract of the parties, but by proof of the conversation and circumstances attending the making of the subsequent loan. The parties may agree upon making a loan upon collaterals that these may also be held as security for a previous loan, whether that be secured or not. If such an agreement be proved the security applies as much to the pre-existing debt as to that which was incurred at the time of the transaction.[4]

An agreement to allow a judgment given as security for

v. Bailey, 47 Barb. (N. Y.) 395; Wyckoff v. Anthony, 9 Daly (N. Y.) 417, 90 N. Y. 442, 27 Alb. L. J. 94, 15 N. Y. Weekly Dig. 461.

[1] Grant v. Taylor, 3 J. & S. (N. Y.) 338, 350; Brandao v. Barnett, 3 C. B. 519.

[2] Grant v. Taylor, 3 J. & S. (N. Y.) 338, 350, per Van Vorst, J.

[3] Buchanan v. International Bank, 78 Ill. 500; Van Blarcom v. Broadway Bank, 9 Bosw. (N. Y.) 532, 37 N. Y. 540; Smith v. Dennison, 101 Ill. 531; Moors v. Washburn, 147 Mass. 344, 17 N. E. Rep. 884.

[4] Smith v. Dennison, 101 Ill. 531; Merchants' Nat. Bank v. Demere, 92 Ga. 735, 19 S. E. Rep. 38.

notes to continue after the notes are paid as security for other notes may be made by an agent under parol authority.[1]

If one is indebted to another in several distinct obligations, and transfers property in pledge, without particularly designating the debts which it shall secure, it would seem that the creditor would be entitled to apply it as he would a payment made, under like circumstances, to secure such debt or debts as he might himself choose. A pledge given to a surety to secure him for several liabilities, without any designation of the liability to which it shall be first applied, may be applied to the security and payment of those liabilities in such order as he pleases.[2]

§ 358a. **A pledge made by one partner to a bank to secure a loan to him may by agreement secure an indebtedness of his firm,** and such an indebtedness is covered by the words "any other note or claim against me held by said bank." Shares of stock were pledged by a member of a firm to secure a loan to him from a bank, then holding the firm's acceptances. He gave the bank a demand note, made out upon a printed form furnished by it, reciting that "on the non-performance of this promise" the bank might sell the stock and apply "the net proceeds to the payment of this note," accounting to him "for the surplus, if any," and that "such surplus, or any excess of collaterals upon this note," should be applicable "to any other note or claim against me held by said bank." Upon a demand he made partial payments, but failed to pay the residue, requesting the bank to make the balance a time loan, which the bank refused, it being understood, however, that the demand should not be pressed without further notice. This notice the bank gave, and, upon non-payment, sold the stock for an amount sufficient to pay what was due on the note, and leave a balance in its hands. It was held that there was a non-performance of the promise contained in the note,

[1] Kaufman's App., 161 Pa. St. 469, 29 Atl. Rep. 1.

[2] Norton v. Plumb, 14 Conn. 512, 517.

which entitled the bank to sell the shares; and that the bank could apply the balance in its hands to the payment of the firm acceptances remaining unpaid.[1]

§ 359. **A pledge may be a continuing security, if so made in terms.**[2] In that case an extension of time upon the principal debt, or a renewal of that debt in the ordinary course of business, will not discharge the lien of the pledge. Thus, a pledge of stock by a married woman to a bank "as security for the payment of any demands the bank may from time to time have or hold against" her husband, clearly applies to any future indebtedness of his to the bank. Such a pledge is as wide in limit as well as it could be. "It specifies no kind of demand, no amount, no length of time of any indebtedness, no length of time for which the stock might be liable." The pledgor might afterwards by notice to the bank limit the liability to debts then existing; but so long as the pledge remains

[1] Hallowell v. Blackstone National Bank, 154 Mass. 359, 363, 28 N. E. Rep. 281. Mr. Justice Holmes in his opinion said: "The printed form, it may be assumed, would have been used by the bank equally in a case where the borrower was the principal man in his firm and the only one known to the bank, was borrowing for his firm daily, and had never borrowed for himself but in this instance, and in a case where the borrower's membership in a firm whose notes the bank held was unknown. This being so, in the opinion of a majority of the court there is no sufficient reason for not giving the words their full legal effect. The clause pledging the property for any other claims against the debtor is not inserted with a view to certain specific debts, but as a drag-net to make sure that whatever comes to the creditor's hands shall be held by the latter until its claims are satisfied. Cory on Accounts and Lindley on Partnership have made it popular to refer to a mercantile distinction between the firm and its members. But we have no doubt that our merchants are perfectly aware that claims against their firms are claims against them, and when a merchant gives security for any claim against him, and there is nothing to cut down the literal meaning of the words, he must be taken to include claims against him as partner."

See, also, Fall River Nat. Bank v. Slade, 153 Mass. 415, 26 N. E. Rep. 843; Richardson v. Washington Bank, 3 Met. 536; Wilcox v. Fairhaven Bank, 7 Allen 270.

[2] Merchants' Nat. Bank v. Hall, 83 N. Y. 338.

unlimited, it will cover any new obligation within the terms of the agreement.[1]

§ 360. **A banker may have a lien for a general balance due him** upon all the securities of his customer which may come into the banker's hands for any purpose, unless there be evidence to show that he received any particular security under special circumstances which would take it out of the common rule.[2] But here, as in other cases of lien, says Judge Story, the right to retain for the general balance of accounts may be controlled by any special agreement which shows that it was not intended by the parties. Thus, for example, if securities have been deposited with a banker as a pledge for a specific sum, and not generally, that will repel the inference that it was intended to give a lien for the general account or balance between the parties.[3]

Under an agreement that all collaterals given by a debtor to a bank should be held and applied for the payment of any balance due from him to the bank, a surplus arising from the sale of a particular security belongs to the bank.[4]

Where a debtor by letter directed a bank to which he had pledged certain stock as collateral security for a specific debt, "to hold the stock as a general collateral security for all his liabilities to the said bank, at present existing or which may hereafter be incurred by him," the bank was authorized to apply the surplus of the stock, after payment of the specific debt, *pro rata* to all such liabilities.[5]

[1] Merchants' Nat. Bank v. Hall, 83 N. Y. 338; affirming 18 Hun 176, 38 Am. Rep. 434; Gillet v. Bank of America, 21 App. Div. 392, 47 N. Y. Supp. 558; Fidelity Mut. L. Ins. Co. v. Germania Bank, 74 Minn. 154, 76 N. W. Rep. 968.

[2] Lord Kenyon in Davis v. Bowsher, 5 T. R. 488, 491; Bolland v. Bygrave, Ry. & M. 271, per Abbott, C. J.

[3] Story on Agency, § 381; *In re* Medewe's Trust, 26 Beav. 588; Vanderzee v. Willis, 3 Bro. C. C. 21; Lane v. Bailey, 47 Barb. (N. Y.) 395; Wyckoff v. Anthony, 90 N. Y. 442.

[4] Walker v. Abt, 83 Ill. 226; Moors v. Washburn, 147 Mass. 344, 17 N. E. Rep. 884.

[5] Eichelberger v. Murdock, 10 Md. 373, 69 Am. Dec. 140. See Bacon v. Bacon, 94 Va. 686, 27 S. E. Rep. 576.

§ 360a. **A pre-existing debt is not a sufficient consideration to constitute a pledgee a holder for value.** "Whatever may be the law in the case of a transfer of chattels in payment of a pre-existing debt, when the debt is thereby discharged we think that by the weight of authority a pledging of chattels as security for a pre-existing debt, when there is no present consideration whatever for the pledge, does not constitute the pledgee a holder of value."[1] The rule is different, however, in regard to negotiable paper. In the same case from which the above quotation was made, the court say: "In this Commonwealth, it is held that taking a negotiable promissory note before maturity as security for a pre-existing debt, is a taking for value, and that any equities which may exist between the maker and the persom from whom it is taken can not be set up against such a holder, if he took the note in good faith, and without knowledge of these equities."[2]

§ 361. **A pledge may secure a future indebtedness,** as well as an indebtedness existing at the time.[3] It may be made as a continuing security for all advances the pledgee might make to the pledgor; and in such case the pledge will be a security for all advances made prior to the time that some third person acquires an interest in the collaterals pledged.[4] A general se-

[1] Goodwin v. Massachusetts Loan & Trust Co., 152 Mass. 189, 199, 25 N. E. Rep. 100, per Field, C. J., citing Loeb v. Peters, 63 Ala. 243; Wert v. Naylor, 93 Ind. 431; Sleeper v. Davis, 64 N. H. 59, 6 Atl. Rep. 201; Linnard's Appeal (Pa.), 3 Atl. Rep. 840; Merchants' Ins. Co. v. Abbott, 131 Mass. 397, 400; Lesassier v. The Southwestern, 2 Woods 35; Currie v. Misa, L. R. 10 Ex. 153; Leask v. Scott, 2 Q. B. D. 376; Rodger v. Comptoir d'Escompte de Paris, L. R. 2 P. C. 393; Chartered Bank v. Henderson, L. R. 5 P. C. 501.

[2] See §§ 107–112.

[3] Sitgreaves v. Farmers' & Mechanics' Bank, 49 Pa. St. 359; Calkins v. Lockwood, 16 Conn. 276, 288, 41 Am. Dec. 143; Wolf v. Wolf, 12 La. Ann. 529; D'Wolf v. Harris, 4 Mason (U. S.) 515; Stearns v. Marsh, 4 Den. (N. Y.) 227; State Sav. Asso. v. Hunt, 17 Kan. 532; Buchanan v. International Bank, 78 Ill. 500; Texas Banking & Ins. Co. v. Turnley, 61 Tex. 365.

[4] Buchanan v. International Bank, 78 Ill. 500.

curity for all advances that the creditor may make applies not only to unsecured advances, but also to those for which a special security is also taken; and in that case the creditor may rely upon either security or both; and it lies solely with him, and not with the debtor or anyone claiming under him, to determine in any instance which security he will enforce.[1] Whether a pledge covers existing debts or is limited to those that may thereafter arise, depends upon the terms of the agreement of hypothecation. Thus a pledge of stock to a bank "as security for the payment of any demands it may from time to time hold against" a debtor named, in terms includes all demands the bank held against him at that time, as well as those that might arise afterwards.[2] "The agreement does not in terms name or describe debts made before the pledge. It does not in terms name or describe acts that were done or could have been been done, only before the pledge. It does speak of acts which, though begun before the agreement, could be continued and thus be acts done after its making. When it provides for demands that the bank may from time to time have and hold against the debtor, it speaks of the act of having and holding a demand; and that is an act that could be done after the making of the agreement, though the demand arose before, and though as an act of having and holding it, it was begun before. If the debtor had, before the date of the agreement, made his note to a stranger, and after that date the bank had become the assignee of the note, the bank would have had and held it after the making of the pledge. The demand thereon would have fallen within the language of the agreement; whether within the intention of the parties to the agreement is another question. It would have been a demand had and held by the bank from time to time (that is, at any or some time during the running of the agreement) against the debtor, and so would have been

[1] Buchanan v. International Bank, 78 Ill. 500; Moors v. Washburn, 147 Mass. 344, 7 N. E. Rep. 884.

[2] Merchants' Nat. Bank v. Hall, 83 N. Y. 338; affirming 18 Hun 176, 178, 38 Am. Rep. 434.

literally one of the demands spoken of by the instrument. It is plain that the date of origin of the demand is not the test whether the pledge applies to it. The act of having and holding is.'"[1]

§ 361a. **The pledge may secure in addition to a specific debt the pledgor's future liabilities to the pledgee,** but not a past or prior liability. Thus, one borrowed a sum of money from a bank, for which he executed and delivered to the bank a demand note, depositing at the same time as collateral security for its payment, certain stocks and bonds. The note contained this provision: "It is also agreed that if I shall come under any other liability, or enter into any other engagement, with said bank, while it is the holder of this obligation, that the net proceeds of sale of the above securities may be applied either on this note or any other of my liabilities or engagements held by said bank, as its president or cashier may elect." The pledgor afterwards became insolvent, and made an assignment of his property to trustees for the benefit of his creditors. The assignees of the pledgor tendered the amount of the note, with interest to the date of tender, and demanded the note and the securities which had been deposited as collateral. The bank, however, refused to make a surrender of the securities, claiming to hold them as collateral for a demand note of a third person indorsed by the pledgor, several months before this transaction. In an action of trover brought by the assignees of the pledgor against the bank, it was held that the plain and obvious meaning of the contract, and that which was contemplated by the parties at the time of its execution, was to cover liabilities made after the execution of the note, and those entered into at the time of its delivery, and the stock could not be held as security for a responsibility incurred by the pledgor nearly five months prior to the depositing of the stock.[2]

[1] Per Folger, C. J., in Merchants' Nat. Bank v. Hall, 83 N. Y. 338, 341, 38 Am. Rep. 434.

[2] Harris v. Franklin Bank, 77 Md. 423, 26 Atl. Rep. 523.

§ 361b. **An agreement for a continuing security in a note by a customer to his bank prepared by the bank is to be liberally construed in favor of the customer.** Thus, where an agreement, in a printed form of note furnished by the bank and signed by a customer on obtaining a loan for the amount of the note, by which the customer pledged certain property as collateral security for the payment of the note "or any other liability or liabilities of the undersigned to the said bank, due or to become due, or which may hereafter be contracted or existing," is properly construed, in accordance with the reasonable intention of the parties, as referring only to liabilities of the customer to the bank in the ordinary course of its banking business, the bank is not entitled to retain the pledged property for the purpose of applying it upon a note of the customer to a third party, which, although drawn payable at the customer's bank, was not paid by it or charged to the customer's account, but was dishonored, and then purchased, by the bank. The court of appeals of New York so deciding, said: "It seems clear, when this agreement is construed in the light of the principles and authorities cited, and in view of the circumstances and transactions existing between the parties, that the most the defendant can properly claim for this provision is that it was intended to secure the liabilities of the assignors to the bank arising out of the business transactions or relations existing, or which should subsequently exist, between them as bank and customer, or which came into its hands in the ordinary course of its banking business, whether past, present or future. Under this language the bank could not hold the property pledged as security for a claim, unless it was a liability of the assignors to the bank, or obtained in the usual course of business. The agreement was obviously intended to include those liabilities only."[1]

[1] Gillet v. Bank of America, 160 N. Y. 549, 556, 55 N. E. Rep. 292, reversing 21 App. Div. 392, 47 N. Y. Supp. 558. The term "any other liabilities" of the pledgor includes rediscounts of other notes previously discounted for

§ 362. **In determining what debts are secured by an absolute assignment** of property as collateral security, the whole transaction between the parties is to be looked to.[1] A general assignment may cover all claims of the assignee against the assignor, although a previous special assignment was limited to securing liabilities incurred for the consignor's accommodation.[2]

If a pledge be made by a written instrument for a loan of a definite amount then made, the pledgee can not by parol evidence show that it was agreed between the parties at the time of making the pledge that the property should be held as security, not only for that sum but also for such further advances as the pledgee might afterwards make; for a written agreement can not be enlarged by parol.[3]

§ 363. **A pledge which secures an interest-bearing debt, secures the interest** as much as the principal of the debt. The parties may as between themselves increase the rate of interest, just as they may in any other way increase the debt secured by the pledge. But as against a subsequent pledgee or purchaser, the prior pledgee, after notice of subsequent rights in the property, can not as against them increase the rate of interest, any more than he could increase the principal of the debt secured.[4]

the pledgor by the pledgee. Hanover Nat. Bank v. Brown (Tenn. Ch. App.), 53 S. W. Rep. 206.

[1] Boardman v. Holmes, 124 Mass. 438; Charles v. Coker, 2 S. C. 122; Hilton v. Sims, 45 Ga. 565.

[2] Boardman v. Holmes, 124 Mass. 438.

[3] Hamilton v. Wagner, 2 Marsh. (Ky.) 331, 332.

[4] Jones on Mortgages, § 361.

CHAPTER X.

THE PLEDGOR'S RIGHTS AND LIABILITIES BEFORE DEFAULT.

I. *Right to Sell or Assign his Interest.*

§ 364. **Property under pledge may be transferred by the general owner, subject only to the lien,** by a proper contract and upon a good consideration.[1] "In such case, as the actual custody and possession of the goods for the time being is in the hands of the party having the lien, it follows that a constructive or symbolical delivery is sufficient to pass the property. An order by the vendor upon the keeper, or if the contract of sale or conveyance be in writing, proper and satisfactory notice of the conveyance by the vendee to the holder, constitutes such constructive delivery. Where goods are lying in a warehouse, although subject to a lien for keeping, notice to the warehousekeeper, where all the other requisites of a sale are proved, is equivalent to a delivery. After such notice the keeper ceases to be the agent of the vendor, and becomes the agent of the vendee, and thus the goods are placed under the effective control of the vendee, as they would be by an active delivery."[2]

[1] Franklin v. Neate, 13 M. & W. 481; Whitaker v. Sumner, 20 Pick. (Mass.) 399; Tuxworth v. Moore, 9 Pick. (Mass.) 347, 20 Am. Dec. 479; Fettyplace v. Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688; Cooper v. Ray, 47 Ill. 53; Sanders v. Davis, 13 B. Mon. (Ky.) 432; Bush v. Lyon, 9 Cow. (N. Y.) 52; Ratcliff v. Vance, 2 Mills Const. (S. C.) 239; Brent v. Miller, 81 Ala. 309, 8 So. Rep. 219; National Hudson River Bank v. Chaskin, 28 N. Y. App. Div. 311, 51 N. Y. Supp. 64.

[2] Per Shaw, C. J., in Whitaker v. Sumner, 20 Pick. (Mass.) 399.

If a creditor hold a collateral note under a blank indorsement of the payor, the latter may before maturity of the note sell and assign it with the creditor's knowledge without further indorsement, or without filling up the blank; and such assignee will acquire it free from all equities other than the lien of the pledgee, although it be not delivered by the latter to such assignee until after maturity.[1]

§ 365. **One taking an assignment from the pledgor of his contract of pledge, acquires only the latter's rights,** inasmuch as he is chargeable with notice of all that he might learn upon inquiry in respect to the contract and the rights of the parties under it.[2]

An assignee for the benefit of creditors of the pledgor has only the rights of the pledgor, and can not rightfully take possession of the pledged property.[3] He can not attack the sufficiency of the possession of the pledgee, if that was sufficient as against the pledgor.[4]

§ 366. **A right reserved by the pledgor to sell the thing pledged,** to be exercised at any time upon payment of the debt secured, gives him no right to sell it until he has first paid the debt. If the pledgor obtain possession of the property and sell it without the pledgee's consent, he is liable for a conversion of it.[5]

The pledgor's assignee may enforce in his own name or in the name of his assignor such rights in the pledge as he does acquire. Where bonds and stocks are pledged as collateral security, under a contract stipulating that in the event of the reduction of the indebtedness, the pledgor should be entitled to select and withdraw from the securities so pledged an

[1] Grimm v. Warner, 45 Iowa 106.

[2] Taggart v. Packard, 39 Vt. 628; Smith v. Lee, 84 Fed. Rep. 557.

[3] George v. Pierce, 123 Cal. 172, 55 Pac. Rep. 775; affirmed 56 Pac. Rep. 53; Francisco v. Aguirre, 94 Cal. 180, 29 Pac. Rep. 495. See Goodbar v. Locke, 56 Ark. 314, 19 S. W. Rep. 924.

[4] George v. Pierce, 123 Cal. 172, 55 Pac. Rep. 775; affirmed 56 Pac. Rep. 53.

[5] Prescott v. Prescott, 41 Vt. 131.

amount equal to the reduction, one to whom the pledgor has sold and transferred a part of such securities can maintain his right to them, as against the pledgee, where it is shown that prior to such transfer the pledgor had paid, or caused to be paid, on such indebtedness, a sum in excess of the value of the securities so transferred.[1]

§ 367. **Notice to a purchaser of goods of a pledgee's lien thereon for advances, charges the purchaser with its payment,** if he has such notice before or at the time of accepting the goods.[2] Thus, if the purchaser receives the goods upon the order of the general owner, which directs the delivery of the goods upon the payment of a certain sum to the pledgee, who is authorized to give the purchaser credit therefor, and the pledgee delivers the goods accompanied by a bill or invoice charging the amount due him, in an action therefor, the purchaser can not offset a claim he has against the general owner.[3]

And so, if one holding a fund against which he knows a claim is made by another as pledgee, although not aware that the pledge extends beyond a specific loan which has been paid, pays over the fund to the general owner, he does so at his peril.[4]

The holder of a fund against which he knows that a claim is made by another as pledgee, is chargeable with interest if

[1] First Nat. Bank v. Root, 107 Ind. 224, 8 N. E. Rep. 105.

[2] Nottebohm v. Maas, 3 Robt. (N. Y.) 249.

[3] Carrington v. Ward, 71 N. Y. 360, *363, affirming 10 J. & S. 572. Folger, J., in the court of appeals, said: "Thus we have beyond dispute the existence of the lien, and the defendants' knowledge or binding notice thereof, or notice enough to obligate inquiry. It is beyond dispute that the plaintiffs never gave up their lien, or did anything to lead the defendants to suppose that they meant to, or to induce action in the defendants in reliance upon a belief that the plaintiffs meant to relinquish it. The act of delivery of the oil to the defendants was accompanied by an invoice, which, in its contents, was a written claim for fifteen dollars per barrel. The defendants took the oil with that claim. They were bound to make inquiry, or to refuse and return the oil, or to take it with the obligation on their part to make payment of that sum at a proper time."

[4] Moors v. Washburn, 159 Mass. 172, 34 N. E. Rep. 182.

he has used the fund, or has not kept it as a separate trust fund.[1]

§ 368. **If the pledgor's assignee give notice of his ownership to the pledgee,** the latter is liable if he afterwards delivers the property to the pledgor or to any one else, without the assignee's consent.[2]

By agreement of a pledgor and pledgee the latter may hold the security pledged for the benefit of another creditor of the pledgor; and in that case any sum received by the pledgee from the security above the amount necessary to satisfy his claim should be applied on the pledgor's debt to such other creditor. The agreement of the parties operates as an equitable assignment of such surplus, should there be any.[3]

§ 369. **For a conversion of the pledge which has taken place before the pledgor's assignment of it,** the assignee can not recover against the pledgee or other person in his own name. A demand for the chattel by such assignee upon the pledgee, and his refusal to give it up, because he had already parted with its possession, does not constitute a conversion. Neither can such assignee claim by virtue of a previous demand by the pledgor.[4] But if the pledgor has assigned not merely the property but also his cause of action for a conversion already made by the pledgee, then the assignee could maintain an action either in his own name or that of his assignor, according to the code of procedure under which the action is brought, for such prior conversion.[5]

§ 370. **A pledgor's assignee is entitled to redeem the pledge,** or to recover judgment for a subsequent conversion of it by the pledgee or other person.[6] The assignee is at all times en-

[1] Moors v. Washburn, 159 Mass. 172, 34 N. E. Rep. 182.

[2] Duell v. Cudlipp, 1 Hilt. (N. Y.) 166.

[3] Second Nat. Bank v. Sproat, 55 Minn. 14, 56 N. W. Rep. 254.

[4] Duell v. Cudlipp, 1 Hilt. (N. Y.) 166.

[5] Duell v. Cudlipp, 1 Hilt. (N. Y.) 166; McKee v. Judd, 12 N. Y. 622.

[6] Kemp v. Westbrook, 1 Ves. 278; Franklin v. Neate, 13 M. & W. 481;

titled to redeem the pledge, by paying such a sum as would have cancelled and discharged the pledgee's claim at the time of the assignment. If the pledgee sell the pledge, the prior assignee is entitled to the surplus money, and in a suit to recover it the pledgee can set off no claim which he has against the pledgor other than the specific debt, to secure which the pledge was made.[1]

If the pledgor sells the pledged property while it is in the hands of his pledgee and the purchaser does not redeem it, but the pledgee sells it at auction at a sale fairly conducted for less than the price agreed upon between the pledgor and his vendee, the latter, if purchasing with notice of the pledge, is liable to an action to recover the difference between the contract price, less the amount paid, and the proceeds of sale realized by the pledgee.[2]

§ 371. **A pledgee of corporate bonds or other like collateral securities does not affirm their genuineness, by delivering them to one purchasing from the owner,** although he receives the purchase-money directly from the purchaser, and after deducting the amount of the debt secured pays over the residue to the owner. In the absence of fraud the purchaser can not recover back the purchase price in case the securities prove to have been forged. A pledgee upon receiving payment is bound to deliver the securities to whomsoever the pledgor may direct, and the fact that the whole proceeds are paid to him, and that he pays over only the surplus to the pledgor, does not change the character of the transaction from a payment to the pledgee to a sale by him. Nor does the circumstance that the original transaction was in the form of a purchase of bonds by the pledgee at the request of the pledgor, with an agreement that the former would within a definite time sell the bonds to the latter for the amount of the loan applied for and

Dupré v. Fall, 10 Cal. 430; Durfee v. Harper, 22 Mont. 354, 368, 56 Pac. Rep. 589.

[1] Van Blarcom v. Broadway Bank, 37 N. Y. 540.

[2] Habenicht v. Lissak, 77 Cal. 139, 19 Pac. Rep. 260; Civ. Code of California, § 3311.

made, change the character of the transaction, though this form was given to it to avoid the usury laws. The pledgee may, notwithstanding, show the real transaction, and avoid all responsibility for the genuineness of the bonds.[1]

Nor is there any such responsibility on the part of a creditor who, upon the order of his debtor, transfers the debtor's note and pledge of a spurious certificate of stock to another upon receiving the amount of the note, both parties being ignorant of the spuriousness of the certificate. The person so taking the certificate can not recover back the purchase-money from the pledgee, as upon a sale of the note and stock, for the transaction is not a sale.[2] "The case then is strictly this: the Schuylers owe the defendant money, and they procure the plaintiffs to pay that money. As security for such payment, or upon some other consideration not disclosed, they at the same time procure the defendant to transfer to the plaintiffs a certificate of stock, of which the defendant held the formal title, but which belonged wholly to the Schuylers, and was subject to their control. Both the plaintiffs and the defendant thought the certificate valuable, but it is in truth worthless, and the plaintiffs have lost their money. With whom did the plaintiffs deal for the stock? Not with the defendant, who did not have and did not profess to have any beneficial title to it, but with the Schuylers, who, when their debt to the defendant was paid, were the owners. The defendant assumed nothing, warranted nothing. What he had received on the loan to the Schuylers he was bound and was willing, the loan being paid, to give back to them, if they chose to take it, or if not, to the parties whom they should name to be the recipients of the title. They named the plaintiffs, and the defendant made the transfer to them. I can see no reason why such an act should involve any responsibility on the part of the defendant."[3]

[1] Baker v. Arnot, 67 N. Y. 448; affirming 5 T. & C. 215.

[2] Ketchum v. Bank of Commerce, 19 N. Y. 499.

[3] Ketchum v. Bank of Commerce, 19 N. Y. 499, per Denio, J.

II. *Liability of his Interest to Attachment and Execution.*

§ 372. **At common law goods held in pledge can not be attached or taken in execution** in an action against the pledgor.[1] While the debt which the pledge was made to secure remains unpaid no part of the property pledged can be awarded to another creditor of the pledgor solely on the ground that the remainder would probably be sufficient to pay the debt secured.[2] The pledgee's possession can not be disturbed, because the pledgor's creditor, or the officer acting for him in making the attachment or levy, can acquire no greater interest in the property and no greater control over it than that possessed by the pledgor, against whom ran the process of the court. "A mere equitable interest can not be taken and sold on execution; for where there is no legal right there is no legal remedy."[3] This statement is strictly applicable to mortgages of chattels.[4] But in the case of a pledge, though the pledgor has the general ownership, and, in general, the legal title, yet the possession being in the pledgee, the pledgor has strictly only a right to redeem; and neither he nor any one in his right can regain possession, or a right to it, except upon payment, or tender of payment, of the amount for which the property is held in pledge.[5] A creditor of the pledgor could not compel the pledgee to accept payment of the debt before its maturity, even if he could compel such acceptance in any case.

[1] Scott v. Scholey, 8 East 467; Metcalf v. Scholey, 5 Bos. & Pull. 461; Badlam v. Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Pomeroy v. Smith, 17 Pick. (Mass.) 85; Hunt v. Holton, 13 Pick. (Mass.) 216, 221; Holbrook v. Baker, 5 Me. 309, 17 Am. Dec. 236; Soule v. White, 14 Me. 436; Thompson v. Stevens, 10 Me. 27; Wilkes v. Ferris, 5 Johns. (N. Y.) 336, 4 Am. Dec. 364; Marsh v. Lawrence, 4 Cow. (N. Y.) 461; Stief v. Hart, 1 N. Y. 20, 28, per Jewett, C. J.; Srodes v. Caven, 3 Watts (Pa.) 258; Briggs v. Walker, 21 N. H. 72, 77; Hudson v. Hunt, 5 N. H. 538; Dowler v. Cushwa, 27 Md. 354, 366; Ætna Ins. Co. v. Bank of Wilcox, 48 Neb. 544, 67 N. W. Rep. 449.

[2] Ætna Ins. Co. v. Bank of Wilcox, 48 Neb. 544, 67 N. W. Rep. 449.

[3] Badlam v. Tucker, 1 Pick. (Mass.) 389, per Wilde, J.

[4] Jones on Chattel Mortgages, § 555.

[5] Picquet v. Swan, 4 Mason 443, 464; McClintock v. Central Bank, 120 Mo. 127, 24 S. W. Rep. 1052.

It is only by a bill in equity[1] or by statute that this can be done. Though it has been intimated in a few cases that possibly an attachment of pledged property might be sustained, upon payment or tender to the pledgee of the amount due him; yet it is doubtful whether this can be done without express statutory authority therefor. A resort to this expedient seems to have been generally regarded as too hazardous to attempt, in the absence of any direct authority to sustain it.[2]

If, however, the pledgee voluntarily surrenders possession of the pledge upon receiving payment of the debt secured by it, it seems that the property thereupon is subject to levy and sale upon execution against the pledgor.[3] Perhaps, also, a creditor of the pledgor may, with the consent of the pledgee, attach the property pledged and take possession of it, holding it as a representative of the pledgee and by virtue of the attachment.[4]

§ 373. **Neither is property held in pledge generally subject to attachment by trustee or garnishee process,** except by virtue of statutory provisions.[5] This is upon the principle that a garnishee is not liable in respect to such property of the defendant in his hands as is not capable of being seized and sold under execution. A garnishee or trustee, in the absence of any agreement that he shall sell the property held by him in pledge, can not be compelled to do so; but if he does sell it under a power, and there is a surplus in his hands after pay-

[1] Ritchie v. McMullen, 79 Fed. Rep. 522, 25 C. C. A. 50.

[2] Sargent v. Carr, 12 Me. 396.

[3] Mower v. Stickney, 5 Minn. 397, 404. In this case Emmett, C. J., said: "If property be pledged by the owner, his creditors may not be able to deprive the pledgee of his possession without first satisfying his claim; yet that is a matter which concerns the pledgee alone, and if he deliver the property to the officer, we can not see that the pledgor has any right to complain; nor why it may not be levied upon and sold subject to the claim of the pledgee."

[4] Farr v. Kilgour, 117 Mich. 227, 75 N. W. Rep. 457.

[5] Drake on Attachment, § 539; Whitney v. Dean, 5 N. H. 249; Howard v. Card, 6 Me. 353; Kergin v. Dawson, 1 Gilm. (Ill.) 86; Patterson v. Harland, 12 Ark. 158. See as to Michigan, § 383; Kimbrough v. J. K. Orr Shoe Co., 98 Ga. 537, 25 S. E. Rep. 576.

ing the debt secured, such surplus may be reached by this process.[1]

§ 374. **Statutes have been enacted in several of the states** to enable creditors of the general owner to reach and apply his interest in pledged property to their claims by process of attachment and execution. Full protection, however, is always given to the pledgee.

§ 375. **Alabama.**—There is no special statute respecting the mode of attaching or levying execution upon the interest of a pledgor in the pledge; but it seems that such interest may be attached by process of garnishment under the general statute.[2] It seems, also, that an execution might be levied upon such interest, for it is held that the interest of a mortgagor of chattels or of one who has conveyed personal property by a bill of sale absolute on its face, as a mere security for a debt, may be sold under execution, and that the sheriff has the right to take the property into his possession for the purpose of making the levy.[3]

§ 376. **California.**—The interest of a pledgor in a pledge may be reached by garnishment. It is provided that "all goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, are liable to execution."[4] It is further provided that debts, credits, and other personal property not capable of manual delivery, may be attached by garnishee process. The garnishee may be examined respecting the property, and "the court or judge may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff on such terms as may be just, having reference to any liens or claims against the

[1] Badlam v. Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Howard v. Card, 6 Me. 353.

[2] Petty v. Overall, 42 Ala. 145, 94 Am. Dec. 634.

[3] McConeghy v. McCaw, 31 Ala. 447.

[4] Code of Civil Procedure 1885, § 688.

same.'"[1] Whilst, therefore, the interest of the pledgor may be reached by a general creditor, this can only be done by serving a garnishment upon the pledgee, and not by a seizure of the pledge. The interests of the pledgee are protected by the court under the discretionary power conferred by the statute.[2]

§ 377. **Colorado.**[3]—When it shall appear that the goods, chattels, choses in action, or effects in the hands of a garnishee, are mortgaged or pledged, or in any way liable for the payment of a debt to him, the plaintiff may be allowed, under an order of the court or justice of the peace for that purpose, to pay or tender the amount due to the garnishee; and he shall thereupon deliver the goods, chattels, choses in action, and effects to the officer who holds the execution.

§ 378. **Georgia.**[4]—Property in pawn may be seized and sold under execution against the pawnor, but upon notice by the pawnee to the levying officer, the court, in distributing the proceeds, will recognize his lien according to its dignity, and give such direction to the funds as shall protect his legal rights.

§ 378a. **Illinois.**[5]—The share or interest of a stockholder in any corporation may be taken on execution, and sold as hereinafter provided, but in all cases where such share or interest has been sold or pledged in good faith for a valuable consideration, and the certificate thereof has been delivered upon such sale or pledge, such shares or interest shall not be liable to be taken on execution against the vendor, or pledgor, except for the excess of the value thereof over and above the sum for which the same may have been pledged and the certificate thereof delivered.

[1] Code of Civil Procedure 1885, § 545.

[2] Treadwell v. Davis, 34 Cal. 601, 607, 94 Am. Dec. 770.

[3] Mills' Annot. Stats. 1891, § 2738; Laws 1879, p. 82, §§ 17, 18.

[4] Code 1873, § 2144; 1895, § 2962.

[5] R. S. 1898, c. 77, § 52. See Rice v. Gilbert, 173 Ill. 348, 50 N. E. Rep. 1087, affirming 72 Ill. App. 649.

§ 379. **Indiana.**[1]—Goods and chattels pledged, assigned or mortgaged as security for any debt or contract may be levied upon and sold on execution against the person making the pledge, assignment, or mortgage subject thereto, and the purchaser shall be entitled to the possession, upon complying with the conditions of the pledge, assignment or mortgage.

§ 380. **Louisiana.**—Property held in pledge is subject to attachment and to levy of execution in a suit against the pledgor, subject, however, to the pledgee's claim.[2] In a recent case the supreme court of the state say:[3] "It is now well settled in our jurisprudence, that the property of any nature, held in pledge by a creditor, may be seized from his possession by another creditor of the common debtor, and sold subject to the pledgee's claim. The only right which the law secures to the pledgee is to satisfy his debt 'by privilege and in preference to other creditors of his debtor, out of the product of the movable, corporeal, or incorporeal, which has been thus burdened.'[4] Nothing in the nature of the contract can authorize the pledgee to hold indefinitely the property pledged, which is usually far in excess of the amount thereby secured, and to thus deprive other creditors of their recourse on the debtor's property."

§ 381. **Maine.**[5]—Personal property not exempt from attachment, mortgaged, pledged, or subject to any lien created by law, and of which the debtor has the right of redemption, may be attached, held and sold as if it were unincumbered, if the attaching creditor first tenders or pays the mortgagee, pledgee, or holder, the full amount unpaid on the demand so secured thereon. When personal property, attached on a writ or seized on execution, is claimed by virtue of such mortgage, pledge, or lien, the claimant shall not bring an action against

[1] 2 R. S. 1876, p. 207, § 436; Burns' R. S., § 734. See Jones on Chattel Mortgages, § 578.

[2] Auge v. Variol, 31 La. Ann. 865.

[3] Horner v. Dennis, 34 La. Ann. 389.

[4] Civ. Code, art. 3157.

[5] R. S. 1883, c. 81, §§ 43–46. See Jones on Chattel Mortgages, § 581, for notes to this statute of cases arising under mortgages.

the attaching officer therefor until he has given him at least forty-eight hours' written notice of his claim, and the true amount thereof; and the officer or creditor may, within that time, discharge the claim by paying or tendering the amount due thereon, or he may restore the property. The officer may give the claimant written notice of his attachment; and if he does not, within ten days thereafter, deliver to the officer a true account of the amount due on his claim, he thereby waives the right to hold the property thereon; and if his account is false, he forfeits to the creditor double the amount of the excess to be recovered in an action on the case. If the creditor redeems such property, and it is subsequently sold by the officer, he shall, from the proceeds, first pay to the creditor the amount with interest paid by him to redeem, and apply the balance, if any, to the debt on which it was attached or seized on execution.

When a trustee[1] states in his disclosure that he had, at the time the process was served on him, in his possession, property not exempted by law from attachment, mortgaged, pledged, or delivered to him by the principal defendant to secure the payment of money due to him, and that the principal defendant has an existing right to redeem it by payment thereof, the court or justice before which the action is pending shall order that on payment or tender of such money by the plaintiff to said trustee within such time as the court orders, and while the right of redemption exists, he shall deliver the property to the officer serving the process, to be held and disposed of as if it had been attached on mesne process; and in default thereof that he shall be charged as the trustee of the principal debtor. This order shall be entered on the records of the court or justice. On the return of the *scire facias* against such trustee, if it appears that the plaintiff has complied with the order of the court or justice, and that the trustee has refused or neglected to comply therewith, the court or justice shall enter up judgment against him for the amount due and returned unsatisfied

[1] 1 R. S. 1888, c. 86, §§ 50, 51.

on the execution, if there appears to be in his hands such an amount of the property mortgaged over and above the sum due him, but if not, then for the amount of said property exceeding that sum, if any; and this amount of excess shall, on the trial of *scire facias*, be determined by the court or jury.

§ 382. **Massachusetts.**[1]—Personal property of a debtor that is subject to a mortgage, pledge, or lien, and of which the debtor has the right of redemption, may be attached and held in like manner as if it were unincumbered, if the attaching creditor pays or tenders to the mortgagee, pawnee or holder of the property the amount for which it is so liable within ten days after the same is demanded, as hereinafter provided.

Every such mortgagee, pawnee or holder shall, when demanding payment of the money due to him, state in writing a just and true account of the debt or demand for which the property is liable to him and deliver it to the attaching creditor or officer. If the same is not paid or tendered to him within ten days thereafter the attachment shall be dissolved, and the property shall be restored to him; and the attaching creditor shall moreover be liable to him for any damages he has sustained by the attachment. If he demands and receives more than the amount due to him, he shall be liable for the excess, with interest thereon at the rate of twelve per cent. a year, to be re-

[1] Pub. Stats. 1882, c. 161, §§ 74–78.

See Jones on Chattel Mortgages, § 583, for notes of cases arising under mortgages.

The provisions authorizing the attachment of personal property subject to a mortgage or pledge do not authorize the seizing of such property on execution in the first instance. The remedy of a judgment creditor is by attachment or trustee process. The property can not be taken on execution unless it has been previously attached on mesne process. Lyon v. Coburn, 1 Cush. (Mass.) 278.

A pledgee is entitled to recover of an officer who has unlawfully attached the goods pledged, not merely the amount of the debt secured by the pledge, but the full value of the goods. The rule is founded upon the consideration, that for all beyond the debt, for which the goods are pledged, the pledgee is responsible to the pledgor. Pomeroy v. Smith, 17 Pick. 85.

An attachment of property conveyed by a bill of sale absolute in form, but really given as collateral security, can be dissolved only by a demand in accordance with the statute. Putnam v. Rowe, 110 Mass. 28.

covered by the attaching creditor in an action of contract for money had and received.

When property attached and redeemed as aforesaid is sold on mesne process or on execution, the proceeds thereof, after deducting the charges of the sale, shall be first applied to repay to the attaching creditor the amount so paid by him with interest.

If the plaintiff, after having redeemed the goods, does not recover judgment in the suit, he shall nevertheless be entitled to hold the goods until the defendant repays to him the sum which he paid for the redemption, or as much thereof as the defendant would have been obliged to pay to the mortgagee, pawnee or holder of the goods, if they had not been attached, with interest from the time when the same is demanded of the defendant.

Under this statute one to whom the pledgee of goods has with the pledgor's consent consigned them for sale, can make demand in his own name for the payment of the amount for which they were pledged, upon an officer who has attached them on a writ against the pledgor; and, on refusal of the officer to pay the amount or release the attachment, can in his own name maintain an action against him for the conversion.[1] Such consignee has the right of possession; and *prima facie* that is sufficient to enable him to maintain an action for the possession, or for any injury to the goods. As against trespassers, and those showing no title or right, such possession is sufficient for all purposes.[2]

A contract by which a debtor undertakes to give collateral security to certain of his creditors, by agreeing to hold personal property purchased with money borrowed from them, in trust for their security, does not protect the property from being seized upon attachment or execution by the general creditors of such debtor. Such a trust is an evasion of the general policy of the laws respecting pledges and mortgages.[3]

[1] Clark v. Dearborn, 103 Mass. 335.

[2] Per Wells, J., in Clark v. Dearborn, 103 Mass. 335.

[3] Huntington v. Clemence, 103 Mass. 482.

§ 383. **Michigan.**[1]—When goods or chattels shall be pledged, by way of mortgage or otherwise, for the payment of money or the performance of any contract or agreement, such goods or chattels may be levied upon and sold on execution against the person making such pledge, subject to the lien of the mortgage or pledge existing thereon; and the purchaser at such sale shall be entitled to pay to the person holding such mortgage or pledge the amount actually due thereon, or otherwise perform the terms and conditions of the pledge, at any time before the actual foreclosure of such mortgage or pledge; and on such payments or performances, or a full tender thereof, shall thereupon acquire all the right, interest and property which the defendant in execution would have had in such goods or chattels if such mortgage or pledge had not been made.

There are also provisions for the attachment of property subject to a mortgage or pledge by the process of garnishment. When it appears that a garnishee holds property of the principal defendant subject to any pledge, lien or mortgage, the court may order him to deliver such property to a commissioner or receiver, to be by him disposed of under the direction of the court. The surplus proceeds, after paying the amount of such incumbrance, are applied upon any execution that may be obtained in favor of the plaintiff against the garnishee. The plaintiff may also, by order of court, be allowed to pay or tender the amount due to the garnishee.[2]

§ 384. **Minnesota.**[3]—When goods or chattels are pledged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant, and be entitled to the possession of such goods

[1] 3 Comp. Laws 1897, § 10,318.

[2] 3 Comp. Laws 1897, § 10,607. See Old Second Nat. Bank v. Williams, 112 Mich. 564, 71 N. W. Rep. 150.

[3] G. S. 1894, §§ 5327, 5458.

and chattels, on complying with the terms and conditions of the pledge.

Whenever it appears that any property or effects in the hands of the garnishee, belonging to the defendant, are properly mortgaged, pledged, or in any way liable for the payment of any debt due to said garnishee, the plaintiff may be allowed, under a special order of court, to pay or tender the amount due; and the garnishee shall thereupon deliver the property or effects as hereinbefore provided, to the officer holding the execution, who shall sell the same as in other cases, and out of the proceeds shall repay the plaintiff the amount paid by him to the garnishee for the redemption of such property or effects, with legal interest thereon, and apply the balance upon the execution.

§ 385. **New Hampshire.**[1]—Any personal property not exempt from attachment, subject to any mortgage, pledge, or lien, may be attached as the property of the mortgagor, pledgor, or general owner, the attaching creditor or officer paying or tendering to the mortgagee, pledgee, or holder, the amount for which said property is holden. Such creditor or officer may demand of the mortgagee, pledgee or holder an account, on oath, of the amount due upon the debt or demand secured by such mortgage, pledge, or lien, and the officer may retain such property in his custody until the same is given without tender or payment, and if such account is not given within fifteen days after such demand, or if a false account is given, such property may be holden discharged from such mortgage, pledge or lien.

It is also provided that personal property subject to any mortgage, pledge, or lien, may be taken in execution in the same manner it may be attached, and may be sold in the same manner as other personal property, and the creditor and officer shall have the same right to demand an account of the amount due, and to hold the same, if no account or a false account is

[1] P. S. 1901, c. 220, §§ 17, 18; G. L. 1878, c. 224, §§ 17, 18, c. 236, §§ 3-5.

given, as in case of an attachment. The proceeds of the sale shall be applied to pay the sum paid or tendered to the mortgagee, pledgee, or holder, and interest, and the residue to the satisfaction of the execution on which the same is holden. The debtor's right to redeem such property may be taken on execution and sold as in other cases, without such payment or tender.[1]

§ 386. **New Jersey.**—Goods held in pledge may be taken in execution by a creditor of the pledgor, subject to the rights of the pledgee. If the pledgee does not object to the levy and his claim be satisfied, it would seem that a third party could not object to it. But however this may be, the claim of an execution creditor is good in equity.[2]

§ 387. **New York.**[3]—The interest of the judgment debtor in personal property, subject to levy, lawfully pledged for the payment of money, or the performance of a contract or agreement, may be sold in the hands of the pledgee, by virtue of an execution against property. The purchaser at the sale acquires all the right and interest of the judgment debtor, and is entitled to the possession of the property on complying with the terms and conditions upon which the judgment debtor could obtain possession thereof. This section does not apply to property of which the judgment debtor is unconditionally entitled to the possession.

Even before the enactment of this statute it was held that the interest of a pledgee might be attached or taken in execution in an action against him. The purchaser, however, only obtained his interest.[4] This was asserted upon the ground that the pledgee in possession is armed with the whole power and all the remedies of the law to protect his possession and support his claim.

[1] P. S. 1901, c. 232, §§ 3-5.

[2] Mechanics' Building and Loan Asso. v. Conover, 14 N. J. Eq. 219.

[3] 4 R. S. 1882, § 1412 of Code of Civil Procedure.

[4] Saul v. Kruger, 9 How. Pr. (N. Y.) 569.

The sheriff in levying an execution upon the interest of a pledgor may take actual possession of the goods, and hold them until he sells them. But after the sale the pledgee is entitled to possession until the purchaser redeems them from the pledge.[1]

§ 388. **Pennsylvania.—Property held in pledge may be sold on execution against the pledgor,** but the sale must be subject to the rights and interests of the pledgee.[2] The property can not rightfully be taken from the possession of the pledgee either by the sheriff before the sale or by the purchaser after the sale; and if it be so taken the pledgee may recover the property in replevin or its value in trover.

Goods held in pledge may also be attached by the process of foreign attachment, or garnishment; but in such case the pledgee's right to sell the pledge upon default, or even before that, if by law or custom he has a right to sell before, is not impaired. Thus, if a factor make advances upon goods sent him by his consignor, and they are attached by process of foreign attachment by a creditor of the consignor, the attachment does not arrest the power of the factor to sell, leaving the goods tied up in his hands.

The factor having an interest in the goods, with a right to sell them, can not be affected by an after attachment. "The attaching creditor stands upon no higher footing than his debtor in relation to the garnishee. What right would the debtor himself have to say to the garnishee, 'you shall not sell,' without tendering him his advances and making him whole? Even an execution can not be levied of goods in pawn, so as to take them out of the pawnee's possession, without tendering him the money for which he holds them in pledge. So here the garnishee, as factor to sell, having made advancements, had a power coupled with an interest which was irrevocable except

[1] Bakewell v. Ellsworth, 6 Hill (N.Y.) 484; Stief v. Hart, 1 N. Y. 20; Cotton v. Watkins, 6 Wis. 629.

[2] Reichenbach v. McKean, 95 Pa. St. 432; Srodes v. Caven, 3 Watts 258; Baugh v. Kirkpatrick, 54 Pa. St. 84, 93 Am. Dec. 675.

upon a tender of his charges. Added to the injury to him by protracted storage, a fall in price might leave his advances partially unprotected. If the plaintiff was desirous to retain the goods for an advance in price it was his duty to furnish the money to relieve them of the lien of the garnishees, and to direct the sheriff to take them into custody.'"[1]

§ 389. **Tennessee.**—Property held in pledge may be taken in execution, or attached in a suit against the pledgor; but the creditor can not so take the property without first discharging the debt secured by the pledge.[2]

The fact that a creditor procures a transfer of property held in pledge in another state to a person residing in his own state, and thereupon levies an attachment upon it in a suit against the pledgor, is not such a fraudulent device to get the property within the jurisdiction of the court as will avoid the attachment.[3] The pledgee may lawfully assign his interest in the pledge without the knowledge or consent of the pledgor, and the assignee may take possession of the property and hold it, wherever he may be. Such a transfer is not fraudulent as against the pledgor, unless the intention and effect of the transfer are to conceal the property from the debtor or to prevent his redeeming it.

§ 390. **Texas.**[4]—Goods and chattels pledged, assigned or mortgaged as security for any debtor or contract may be levied upon and sold on execution against the person making the pledge, assignment, or mortgage subject thereto; and the purchaser shall be entitled to the possession, when it is held by the pledgee, assignee, or mortgagee, on complying with the conditions of the pledge, assignment, or mortgage.

§ 391. **Vermont.**—Personal property, not exempt from attachment, subject to a mortgage, pledge or lien, may be at-

[1] Baugh v. Kirkpatrick, 54 Pa. St. 84, 93 Am. Dec. 675, per Agnew, J.

[2] First Nat. Bank v. Pettit, 9 Heisk. 447.

[3] National Bank v. Winston, 5 Baxt. 685.

[4] 2 Bates Annot. Civ. Stats. 1899, art. 2358; R. S. 1879, art. 2296, p. 336.

tached, taken in execution and sold as the property of the mortgagor, pledgor or general owner, in the same manner as other personal property, except as herein otherwise provided.

The officer making such attachment or taking such property on execution, may make a written demand of the mortgagee, pledgee or the holder of such lien for an account in writing, under oath, of the amount due upon the debt secured by such mortgage, pledge, or lien, and may retain such property in his custody until the same is given without tender or payment. Upon receiving such demand, the account shall be rendered within fifteen days by a resident of the state, and within thirty days by a non-resident. If the account is not rendered within the time aforesaid, or if a false account is rendered, such property may be holden and sold discharged from such mortgage, pledge or lien.

If such debt is due at the time of rendering the account, the creditor so attaching or causing such property to be taken on execution, may, within ten days after such account is rendered, pay or tender the amount so rendered to the mortgagee, pledgee, or holder of such lien, and retain and sell such property free and clear of such mortgage, pledge, or lien.

If such debt is not due at the time of rendering the account, but becomes due before the time fixed by the officer making such attachment or levy of execution for the sale of the property, such creditor, within ten days after the debt becomes due, and before the sale, may pay or tender the amount thereof to such mortgagee, pledgee, or holder of such lien, and retain and sell such property as is provided in the preceding section.

If such debt is not due at the time fixed by the officer for sale of the property, the creditor may offer to pay the debt to the mortgagee, pledgee, or holder of the lien, and if such payment is accepted, the same proceedings may be had as is provided in the preceding section.

If such creditor pays or tenders such debt, as is provided in the three preceding sections, to the mortgagee, pledgee, or holder of such lien, he shall be subrogated to all the rights of such mortgagee, pledgee, or holder, and may cause the same

to be sold in the manner that unincumbered personal property may now be sold on mesne or final process, and the proceeds of such sale shall be applied, first, in payment of the sum paid by such creditor to such mortgagee, pledgee, or holder; second, to satisfy the execution.

If the mortgagee, pledgee, or holder of a lien duly renders such account, the attaching creditor may, whether or not the debt is due, cause the property to be sold subject to the mortgage, pledge or lien, without first paying or tendering the amount due on the debt secured thereby. If a mortgagor, pledgor, or conditional vendee of property sold on execution under the provisions of this chapter fails or refuses to discharge such lien after it becomes due and payable, and within ten days after written notice so to do is served upon him by the purchaser of the whole or part thereof, the person so purchasing may tender and pay to the holder of said mortgage, pledge or lien, or said conditional vendor, the amount due said creditor upon the whole of said property, and upon said tender or payment shall be subrogated to all the rights of said original mortgagee, pledgee, or conditional vendor, and may hold the same as security for the amount so paid in discharge of said original claim, together with the sum paid by him on the execution sale, with interest upon said sums, and shall have the same benefit of foreclosure, sale and disposition of said property that the original mortgagee, pledgee, or conditional vendor would have had under his claim.[1]

§ 392. **Wisconsin.**[2]—When goods and chattels shall be pledged or mortgaged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge or mortgage may be sold on execution against him, and the purchaser shall acquire all his right and interest, and shall be entitled to the possession of such goods and chattels on complying with the terms and

[1] Stats. 1894, §§ 1413–1420.

[2] G. S. 1898, § 2988; R. S. 1878, c. 130, § 2988; Hass v. Prescott, 38 Wis. 146; Selleck v. Phelps, 11 Wis. 380.

conditions of the pledge or mortgage; but the officer shall not take such property out of the possession of the pledgee or mortgagee when the judgment debtor is not entitled to the possession thereof, unless the judgment creditor or purchaser shall have first complied with the terms and conditions of such pledge or mortgage.

§ 392a. **Wyoming.**[1]—In all cases where the share or shares of the capital stock of any corporation shall have been pledged in good faith, or hypothecated as collateral security to any loan or debt, and the certificate thereof shall have been delivered upon such pledge or debt, such share or shares shall not be liable to be taken on execution against the pledgor, except for the excess of value thereof over and above the sum for which the same may have been pledged, and the certificate thereof delivered.

[1] R. S. 1887, § 2779.

CHAPTER XI.

THE PLEDGEE'S RIGHTS AND LIABILITIES BEFORE DEFAULT.

I. *His Right to the Use and Profits of the Thing Pledged.*

§ 393. **All collateral security, of whatever it may consist, is held in trust,** first to apply the proceeds of it towards the payment of the debt; and secondly, upon the payment of the debt in full from other funds, to restore the property, or any proceeds thereof which may have been received, to the pledgor.[1] Upon this subject the Code of Louisiana well expresses not only the civil law but the common law as well. It declares that until the debtor be divested of his property he remains the proprietor of the pledge, which is in the hands of the creditor only as a deposit to secure his privilege on it. The creditor is answerable for the loss or decay of the pledge which may happen through his fault. On his part the debtor is bound to pay to the creditor all the usual and necessary expenses which the latter has made for the preservation of the pledge. The fruits of the pledge are deemed to make a part of it, and therefore they remain, like the pledge, in the hands of the creditor; but he can not appropriate them to his own use; he is bound, on the contrary, to give an account of them to the debtor or to deduct them from what may be due to him.

If it is a credit which has been given in pledge, and if this

[1] Felton v. Brooks, 4 Cush. (Mass.) 203, per Shaw, C. J.; and see Blackwood v. Brown, 34 Mich. 4; Union Trust Co. v. Regdon, 93 Ill. 458.

credit brings interest, the creditor shall deduct this interest from that which may be due to him; but if the debt for the security of which the claim has been given brings no interest itself, the deduction shall be made on the principal of the debt. If the credit which has been given in pledge becomes due before it is redeemed by the person pawning it, the creditor, by virtue of the transfer which has been made to him shall be justified in receiving the amount and in taking measures to recover it. When received, he must apply it to the payment of the debt due to himself, and restore the surplus, should there be any, to the person from whom he held it in pledge.[1]

§ 394. **A pledgee has no right to use the pledged chattel, if his use of it will wear or injure it,** so as to lessen its value.[2] Thus if clothes be pawned the pawnee can not wear them, because they will be the worse for the wearing. And so if the thing held in pawn be peculiarly liable to loss, though with careful use its value might not be impaired, the use of it by the pledgee is practically prohibited, because he can only use it at his peril.[3] Thus jewels held in pawn may be worn, if the pawnee takes care not to lose or injure them.[4] But the pawnee would be responsible for a loss through theft or otherwise, which might happen in the wearing; for a pawn is so far in the nature of a *depositum*, that it can not be used but at the peril of the pawnee.[5] A pledgee of diamond rings, whether he

[1] R. Civ. Code 1870, arts. 3166–3170.

[2] McArthur v. Howett, 72 Ill. 358 (case of a sewing machine); Thompson v. Patrick, 4 Watts (Pa.) 414 (case of a harness). See Lawrence v. Maxwell, 53 N. Y. 19.

The Code of the State of Georgia, 1873, § 2141, Code 1895, § 2959, provides that the pawnee may use the goods pawned, provided the use does not impair their real value.

[3] Story on Bailm., § 330.

[4] Jones on Bailm., 81. Judge Story doubts whether there is any foundation for the doctrine that in case of a deposit of things which are not hurt by use, the depositary may, at his peril, use them. Bailm., § 330.

[5] Coggs v. Bernard, 2 Ld. Raym. 909, 917. Chief Justice Holt said: "If the pawn be such as it will be the worse for using, the pawnee can not use it, as clothes, etc.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But

has the right to wear them or not, certainly has no right to change the setting.[1] But the property may be of such a nature that a reasonable use of it by the pledgee may be not only justifiable, but necessary for the proper care of it; and in that case a use of it will be a duty on his part.[2]

§ 395. **If the pledge be of such a nature that it is an expense to the pledgee to keep it,** says Chief Justice Holt, as if it be a horse or a cow, he may use the horse, or milk the cow, by way of recompense for the keeping.[3] But although such use of the pledge is spoken of as a recompense for the keeping, the consistent course is to require the pledgee to account to the pledgor for the use he has made of the pledge, and at the same time to allow the pledgee to charge the pledgor for the reasonable expense of keeping and maintaining the pledge.[4]

then she must do it at her peril; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broken open, and the jewels taken from thence she would be excused; if she wears them abroad and is there robbed of them she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used." Judge Story criticises this reasoning, saying that instead of showing that a pawnee may lawfully use the jewels, it shows that he has no right to do so. Bailm., § 330.

[1] Sheridan v. Presas, 18 Misc. (N. Y.) 180, 41 N. Y. Supp. 451.

[2] Jones on Bailm., 81; Story on Bailm., § 329.

[3] Coggs v. Bernard, 2 Ld. Raym. 909, 917; Mores v. Conham, Owen 123, Bac. Abr. Bailments (B), Salk. 522; Thompson v. Patrick, 4 Watts (Pa.) 414.

[4] Such is the Roman and French law, according to Sir William Jones, who declares this rule to be more agreeable to principle and analogy than that laid down by Lord Holt. Bailments, 82. In Hawkins v. Hubbard, 2 S. D. 631, 51 N. W. Rep. 774, the statutes of *South Dakota* were regarded as prohibiting the use of pledged property, either as compensation for its keeping or otherwise.

In Forrester v. Spencer, 3 U. C. Q. B. O. S. 47, it appeared that A., having been arrested at the suit of a third person, placed a mare in B.'s hands on an agreement that B. should go surety, and if the party arresting proved a demand against A. by his own oath or by that of others, B. was to pay it and keep the mare until repaid. B. did pay 10 pounds, but without showing he did so in consequence of oath of any one; and the mare remaining with him, he used her once in the plow. A. thereupon, without demand, brought trover, alleging this use of the mare was a conversion, and obtained a verdict. The court granted a new trial. Per Robinson, C. J.: "It seems to be clearly settled that the

In Georgia it is provided by the code that the pawnor must pay all necessary expenses and repairs upon the property, but if the pawn itself has been profitable, or if the pawnee has used it to his own advantage, the pawnor may require him to account for such profits.[1]

§ 396. **The pledgee is accountable for whatever profit may accrue to him from the use or possession of the pledge.** Thus he is accountable for the value of the labor of a slave held in pledge.[2]

A pledgee is entitled to hold the natural increase of the thing pledged.[3] Thus if he has taken in pledge domestic animals, he will hold in pledge the young of such animals afterwards born. He is accountable also for any moneys he may receive or collect by virtue of his holding the pledge. Thus, if a policy of insurance upon mortgaged property be assigned to the mortgagee as further security for the mortgage debt, upon the payment of that debt, the policy reverts to the original owner; and if the assignee of the policy afterwards collects a return premium thereon, the pledgor may recover the amount from him.[4]

§ 397. **If money be pledged, and the pledgee loan it, he is accountable for the interest received** therefor. Although the pledgee has given his receipt in writing for the money received in pledge, if this contains no provision in regard to interest, parol evidence is admissible to show the facts that create such

pawnee may use moderately a horse pawned to him in recompense for his meat. If a pawnor of a horse were to remit money to the pawnee and pay his debt, but neglect to call for his horse, leaving him to the pawnee to keep, it may be that the bailment would be at an end by paying the debt, but there could be no reason why the pawnee should not continue to use the horse if he contined to keep him for no other reason than that the pawnor did not come and demand him."

[1] Code 1895, § 2964.

[2] Geron v. Geron, 15 Ala. 558, 1 Am. Dec. 143; Houton v. Holliday, 2 Murph. (N. C.) 111, 5 Am. Dec. 522; Woodard v. Fitzpatrick, 9 Dana (Ky.) 117, 120.

[3] Georgia Code 1895, § 2965.

[4] Felton v. Brooks, 4 Cush. (Mass.) 203; Merrifield v. Baker, 9 Allen (Mass.) 29.

liability. Such evidence does not vary the written contract, for the receipt of the interest is subsequent to the contract, and the pledgee's obligation to pay it does not rest upon the contract or upon any agreement contemporaneous with it. He is liable for the interest because it is an incident of the pledge, and as a matter of law he is bound to restore to the pledgor the increment of the pledge as much as the pledge itself.[1]

§ 398. **Dividends accruing upon pledged stock belong to the pledgee.**[2] A pledgee is entitled to collect a cash dividend upon stock, and to hold it as he holds the stock itself.[3] If he omits to obtain a transfer upon the books of the corporation, the corporation is of course justified in paying the dividends to the pledgor; but he is a trustee of the pledgee therefor, and must account to him.[4] "The dividends follow the legal title in such a case as between the parties, for, until the corporation is wound up, all there is of a share is a right to future profits or dividends." If the pledgor collects the dividends, he holds them in trust for the pledgee, and an action to recover them may be maintained by the pledgee.[5] If a corporation unjusti-

[1] Gilson v. Martin, 49 Vt. 474.

[2] Herrman v. Maxwell, 15 J. & S. (N. Y.) 347; Boyd v. Conshohocken Worsted Mills, 149 Pa. St. 363, 24 Atl. Rep. 287; Hunsaker v. Sturgis, 29 Cal. 142.

[3] Hagar v. Union Nat. Bank, 63 Me. 509.

[4] Fairbanks v. Merchants' Nat. Bank, 30 Ill. App. 28, quoting text, 132 Ill. 120, 22 N. E. Rep. 524; Merchants' Nat. Bank v. Richards, 6 Mo. App. 454; Gaty v. Holliday, 8 Mo. App. 118; Bell v. Lafferty, 1 Pennypacker (Pa.) 454; Herrman v. Maxwell, 15 J. & S. (N. Y.) 347. The court do not rely upon Hill v. Newichawanick Co., 48 How. Pr. (N. Y.) 427, 8 Hun 459, 71 N. Y. 599, because under the facts in that case the dividends passed to the pledgee, not by operation of law, but by the consent of the pledgor.

[5] Guarantee Co. v. East Rome Town Co., 96 Ga. 511, 23 S. E. Rep. 503; Central Nebraska Nat. Bank v. Wilder, 32 Neb. 454, 49 N. W. Rep. 369; Boyd v. Conshohocken Worsted Mills, 149 Pa. St. 363, 24 Atl. Rep. 287; Meredith Village Sav. Bank v. Marshall, 68 N. H. 417, 44 Atl. Rep. 526; Merchants' Nat. Bank v. Richards, 6 Mo. App. 454; Hill v. Newichawanick Co., 8 Hun (N.Y.) 459, 71 N. Y. 593; Herrman v. Maxwell, 15 J. & S. (N. Y.) 347; Gaty v. Holliday, 8 Mo. App. 118, 120. Bakewell, J., said: "The action for money had and received can not be maintained where no legal ground whatever can be shown for inferring a contract to pay over to the plaintiff the money received. But in the case

fiably refuse to make a transfer of stock upon its books of stock which the owner has pledged by delivery of the certificate with a power to transfer, the pledgee may recover of the corporation by suit any dividends accruing upon the stock while he held it in pledge.[1] It is not only the right of the pledgee to collect the dividends in such case, but his duty to his pledgor to do so.[2]

This rule applies to an issue of new stock in the nature of a stock dividend.[3] A pledgee is of course accountable for any profits he may make from a sale and purchase of stock while he holds it in pledge.[4]

If the pledgee fraudulently sells pledged stock to a *bona fide* purchaser, after a declaration of a dividend on the stock but before the time it is made payable, the pledgor is entitled to the dividend.[5]

A dividend was declared on certain stock, which, with a cash payment made by the pledgor would have been sufficient, if paid, to cancel a note due the pledgee, who held the stock as collateral for the note. The dividend was not paid, however, to pledgee, as directed by pledgor, because of a dispute between the pledgor and the corporation as to a set-off claimed

at bar, these dividends, as we have seen, by contract between plaintiff and defendant, belonged to plaintiff as pledgee of the stock on which they were paid; and if received by defendant from the company, it must be regarded that they were received by him to plaintiff's use. Lord Ellenborough says broadly, in Hudson v. Richardson, 4 M. & S. 478, that 'an action for money had and received is maintainable wherever the money of one man has, without consideration, got into the pocket of another.' However this may be, it is certain that in many such cases the law implies a promise to pay the money to the real owner."

[1] Merchants' Nat. Bank v. Richards, 6 Mo. App. 454; Hunt v. Laconia & Lakeport St. R. Co., 68 N. H. 561, 39 Atl. Rep. 437; Meredith Village Sav. Bank v. Marshall, 68 N. H. 417, 44 Atl. Rep. 526; Bath Sav. Inst. v. Sagadahoc Nat. Bank, 89 Me. 500, 36 Atl. Rep. 996; Boyd v. Conshohocken Worsted Mills, 149 Pa. St. 363, 24 Atl. Rep. 287; American Nat. Bank v. Nashville Warehouse & El. Co. (Tenn.), 36 S. W. Rep. 960.

[2] Gaty v. Holliday, 8 Mo. App. 118, per Bakewell, J.

[3] Fairbanks v. Merchants' Nat. Bank, 30 Ill. App. 28, 132 Ill. 120, 22 N. E. Rep. 524.

[4] Hunsaker v. Sturgis, 29 Cal. 142.

[5] Warner v. Watson, 4 Misc. (N. Y.) 12, 23 N. Y. Supp. 922.

by the latter against plaintiff as to a part of the dividend. The note not being paid when due, the pledgor caused the stock to be sold, after due notice, at public auction, and bid in the same as the highest bidder. It was held that the pledgee was entitled to sell the stock. "It thus appears that the dividend was never paid to or collected by the pledgee. After it was declared, it was the property of the pledgor, the same as was the stock. 'The pledgee of the stock had the right to it, and to collect it, if he could do so, but his failure to collect it did not cast upon him the duty of crediting it upon the note.[1] The pledgee certainly was not required to await the result of litigation between the pledgor and the corporation as to the amount the pledgor was entitled to upon the dividend. All the pledgee was required to do was done.'"[2]

§ 399. **In like manner a pledgee of bonds with interest coupons attached is entitled to collect the interest** as it becomes payable, and if the principal debt be not due he will hold the money on the same terms that he holds the bonds.[3] If a corporation pledge its own negotiable bonds with interest coupons attached, and the pledgee collects from the agents of the corporation the coupons that fall due, his act is not a conversion of the bonds.[4] The payment by the corporation is a voluntary one made with knowledge or with means of knowledge of the whole matter; and though the principal debt had not matured, the pledgee would be presumed to have the right to collect the maturing coupons in the absence of any express agreement that he should not do so; for the interest is payable by the terms of the collateral bonds, and a part of the value of the collateral arises from this fact.

A pledgee of any interest-bearing securities is entitled to collect and receive the interest as it becomes payable, and he will hold the sums collected on the same terms as he holds the

[1] Savings Bank v. Middlekauff, 113 Cal. 463, 45 Pac. Rep. 840.

[2] McAulay v. Moody (Colo.), 60 Pac. Rep. 778, 780.

[3] Androscoggin R. Co. v. Auburn Bank, 48 Me. 335.

[4] Androscoggin R. Co. v. Auburn Bank, 48 Me. 335.

securities themselves.[1] It is immaterial in this respect whether the collateral security be a promissory note, a corporate bond, or shares in a corporation.

§ 400. **A pledgee is entitled to all reasonable expenses** incurred in keeping and caring for the pledge.[2] He is also entitled to be reimbursed for all payments made to protect the property from prior liens or incumbrances, and for all necessary payments made in any other way to preserve or protect the security. Thus, if a pledgee of a policy of insurance advances money for the payment of premiums during the continuance of the pledge, he is entitled to be credited the amount of such payments in his account with his debtor.[3] Assessments rightfully paid by a creditor upon stock pledged to him as collateral security are charges in the nature of expenses, and must be refunded by the debtor, as a condition precedent to reclaiming the pledge.[4]

§ 401. **Where the property pledged comes into the creditor's possession in an unfinished state,** such that a court of chancery would order it finished by a receiver, and the creditor does in that respect what the court would have ordered a receiver to do, while the creditor is properly chargeable with the avails of the finished goods, although finished with his property and by his means, he is nevertheless entitled to have such avails applied in the first place to the payment of his disbursements upon the property, before any application is made upon the debt; and any equity acquired by an attachment of such unfinished property by another creditor of the pledgor as the property of the latter, is subordinate to such equity of the pledgee.[5]

§ 402. **But a pledgee has no right to manufacture finished goods from new material** pledged to him, and charge the

[1] Androscoggin R. Co. v. Auburn Bank, 48 Me. 335.

[2] Coggs v. Bernard, 2 Ld. Raym. 909, 917; Starrett v. Barber, 20 Me. 457; Hills v. Smith, 28 N. H. 369; Furness v. Union Nat. Bank, 147 Ill. 570, 35 N. E. Rep. 624.

[3] Raley v. Ross, 59 Ga. 862.

[4] McCalla v. Clark, 55 Ga. 53.

[5] Rowan v. State Bank, 45 Vt. 160.

pledgor with the cost of manufacture, except by virtue of an express contract. Thus, one who has made advances to a lumberman, and taken as security a lien, by written contract, upon lumber to be forwarded by the lumberman "until the same is finally marketed and payment received therefor," is not authorized to manufacture the lumber at the risk of the debtor, and to account only for the net proceeds, provided the proceeds do not amount to the market value of the lumber at the time the creditor received possession of it under the contract.[1]

II. *His Duty to Care for the Thing Pledged.*

§ 403. **A pledgee is bound to use ordinary diligence in the care and custody of the thing pledged.**[2] What diligence is required in any particular case depends upon the character of the thing pledged, and the circumstances attending it. In general, it may be said that a pledgee is bound to exercise the degree of care which an ordinarily prudent man usually bestows upon his own property of a like nature under like circumstances; and he is liable for any loss or injury resulting to the pledge from a failure to use such care.

§ 404. **That a pledgee takes the same care of the pledge that he does of his own property** is not, however, the test of his liability for its loss or destruction. It is true that Sir Edward Coke laid down this rule, saying: "If goods be delivered to one as a gage or pledge, and they be stolen, he shall be discharged, because he hath a property in them; and, therefore, he ought to keep them no otherwise than his own."[3] Sir William Jones, referring to this statement, said: "I deny the first proposition, the reason, and the conclusion." Thereupon he proceeds to state the true rule of diligence required from a

[1] Boody v. Goddard, 57 Me. 602.

[2] Coggs v. Bernard, 2 Ld. Raym. 909; McLemore v. Louisiana State Bank, 91 U. S. 27; Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35; Maury v. Coyle, 34 Md. 235; Girard Fire and Marine Ins. Co. v. Marr, 46 Pa. St. 504; First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. Rep. 976; Georgia Code 1895, § 2963.

[3] Southcote's Case, 4 Rep. 83b.

pledgee:[1] "Since the bailment is beneficial to the pawnee by securing the payment of his debt, and to the pawnor by procuring him credit, the rule which natural reason prescribes, and which the wisdom of nations has confirmed, makes it requisite for the person to whom a gage or pledge is bailed to take ordinary care of it; and he must consequently be responsible for ordinary neglect." If he takes less care of the pledged property than he does of his own he is answerable for its loss. Thus, if he puts his own goods into an iron chest or safe, and leaves property of the same kind, held in pledge, without this protection from theft, and it is stolen he is reponsible for the loss.[2] Of course, if through the pledgee's negligence his own property, as well as that held in pledge, be stolen, he is not absolved from responsibility for the latter. The fact that he has taken the same care of the pledged goods that he did of his own, while both are lost by theft, may furnish, *prima facie*, a presumption of ordinary diligence on his part.[3]

A pawnbroker holding jewelry in pawn kept it in a drawer, locked, underneath his counter. His shop was broken into by burglars, and this, together with other property, was stolen. In an action by the owner of the property against the pawnbroker, the only question of fact was whether the defendant exercised ordinary diligence in the care of the property, and this fact having been found in favor of the defendant, judgment was rendered for him.[4]

§ 405. **In the case of an ordinary pledge, the pledgee is not liable, if the property be destroyed without fault or neglect on**

[1] Bailments, 75. "This is expressly holden by Bracton; and, when I rely on his authority, I am perfectly aware that he copied Justinian almost word for word." Bract., 99b.

See, in this connection, the criticism of Judge Story, both upon the conclusion of Sir Edward Coke and some of the statements of Sir William Jones, Story on Bailm., §§ 334–337.

[2] Vere v. Smith, 1 Vent. 121; Syred v. Carruthers, El. B. & E. 469; Petty v. Overall, 42 Ala. 145, 94 Am. Dec. 634.

[3] Story on Bailm., § 225. See, also, Petty v. Overall, 42 Ala. 145.

[4] Abbett v. Frederick, 56 How. Pr. (N. Y.) 68.

his part. If the common law contract of a pledge were reduced to writing, it would contain, among other things, a stipulation that the pledgee should not be responsible for the loss of the property, unless some want of reasonable and ordinary care on his part were the cause of the loss.

The pledgee is in effect a trustee for the pledgor, to return the property, on payment of the debt secured, and if this be not paid, then to dispose of the thing pledged, and after paying the debt secured, to pay over the surplus to the debtor. While the property is in the possession of the pledgee he should treat it as trust property, and not deal with it so as to impair or destroy its value, or incur the loss of it.[1]

If the pledge be lost while rightfully in the pledgee's hands through any unavoidable accident, the loss falls upon the pledgor. But the case is otherwise if such a loss happens after it has become the pledgee's duty to return the property, and he is holding it without right. "If the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them by him is the reason of the loss.'"[2]

If perishable goods be pledged the pledgee is bound to ordinary diligence in the care of them; but if the pledgor leave them in pledge until they perish naturally the loss will fall upon him, and the pledgee may maintain an action for his loan.[3]

If one of several things pledged be lost without the pledgee's fault, the rest of the things remain liable for the whole debt.[4]

[1] Union Trust Co. v. Rigdon, 93 Ill. 458.

[2] Coggs v. Bernard, 2 Ld. Raym. 909, 917, per C. J. Holt.

[3] Thomason v. Dill, 30 Ala. 444.

[4] Ratcliff v. Davis, Yel. 178, 1 Bulst. 29, Cro. Jac. 244.

The holder of collateral security upon the payment of the debt secured is not chargeable with the value of the collateral securities not returned unless it is shown that through his negligence their value has been lost or impaired.[1]

An indorsee of a negotiable note which recites a deposit of stock as collateral is not liable to the pledgor for the value of the stock, the certificates of which were never in his possession.[2]

§ 406. **The pledgee's obligation to care for the pledge may be modified by the express contract of the parties**; and then his obligation in this regard is to be measured and ascertained by the particular intent of the parties, and not by the general rule applicable to a simple and unqualified pledge; and such intent is to be gathered not only from the express agreement, but from the circumstances of the case, including the conduct of the parties during the continuance of the pledge. Thus, where advances were made to wheat dealers in Portland, Oregon, upon wheat stored by the pledgor in warehouses situated on the river front, and the receipt contained a clause that in case of a flood the property was to be at the risk of the owner; and the wheat was injured by a flood while the pledgor was assuming the care of it, it was held that the pledgee was not responsible for the loss. The pledgor was regarded as taking upon himself the risk of floods while the wheat was owned by him and stored in these warehouses.[3]

The pledgee's liability for due care of the subject of the pledge is modified by the express consent of the pledgor to the mode of care from which injury to the property resulted. Where a piano was pledged as security for a note, and the pledgor consented that it should be stored with friends, who

[1] Robinson v. Hawksford, 9 Q. B. 52; Whitcher v. Dexter, 61 N. H. 91; Kenniston v. Avery, 16 N. H. 117, 120; Haskell v. Africa, 68 N. H. 421, 41 Atl. Rep. 73; Bank of United States v. Peabody, 20 Pa. St. 454.

[2] Haskell v. Africa, 68 N. H. 421, 41 Atl. Rep. 73.

[3] Bank of British Columbia v. Marshall, 11 Fed. Rep. 19. There was also a finding in this case that the pledgee was not guilty of any negligence, even if he could be regarded as an unqualified pledgee, and as such bound to use ordinary care and diligence to prevent injury by a flood.

might use it as compensation for the storage, he can not complain of negligence on the part of the pledgee in thus storing it, and permitting it to be used, though it may have been injured by negligent use on the part of those with whom it was stored, nor can he recover damages for such negligent use by way of counter claim in an action upon the note after sale of the piano by the pledgee.[1]

And so, if the pledgee contracts to keep the property in a particular place, as, for instance, in the safe and vault of a particular bank, he is liable for a loss or injury resulting from his failure to do so, though he was compelled by the officers of the bank to remove the property. If he had no right to keep the property in the vault, that was his affair and not the pledgor's. The contract was not to keep it in the vault if the bank permitted it, but it was absolute; and it was the pledgee's business to see that he had authority to keep it there.[2]

§ 407. **It is competent for the parties to stipulate for a different degree of liability** from that which would attach in the absence of an express contract. Thus if the pledgor places the goods he has pledged in a warehouse selected by himself, and stipulates that they are stored at his risk and expense, the pledgee is relieved of his usual responsibility so long as the goods remain stored in the place designated. But in a case of this kind, where the keeper of the warehouse, on account of some injury to it, removed the goods without the knowledge of the pledgee to another place which was unfit for their storage, and damage resulted to the goods, the pledgee was held responsible for it, on the ground that the keeper of the warehouse was the pledgee's agent, and that it was his duty to see that the goods were kept stored in the place agreed upon, or, if their removal became necessary, to have them stored in a secure and proper place.[3]

[1] Damon v. Waldteufel, 99 Cal. 234, 33 Pac. Rep. 903.

[2] Butler v. Greene, 49 Neb. 280, 68 N. W. Rep. 496.

[3] St. Losky v. Davidson, 6 Cal. 643.

§ 408. **Sometimes a pledgee by contract makes himself liable for the property,** though its loss or destruction be accidental and without fault or neglect on his part. Thus, if a creditor gives a receipt for a chattel held by him as collateral security, in which he promises, on payment of the debt, to deliver the property to the debtor, or its equivalent in money, he is liable for the value of the chattel, though it be destroyed by fire without his fault or negligence. His promise is that he will either return the property or pay its equivalent. "The fact that one part of this alternative promise has become impossible of fulfillment does not relieve him from the other."[1] He accepts the security upon terms which make him responsible for the return of the property in any event. Omitting to attach to his liability for the property any limitation whatever, he places himself in the position of an insurer of its safety, and upon its destruction without his fault is liable for its value.

If there is a special agreement in respect to the care or custody of the property, the rights of the parties are governed by the agreement, rather than any general rules.[2]

§ 409. **In case of a loss by theft** from the pledgee, the rule of his liability is the same as in case of a loss in any other manner; he is liable if he has failed to exercise ordinary care.[3] It has already been noticed that Sir Edward Coke declared that if goods be stolen from one who holds them in pledge, he is discharged; and that Sir William Jones denies this proposition.[4] The latter even asserts the contrary, namely, that one who has suffered the goods to be stolen from him can not be considered as using ordinary care. But the better authority is to the effect that while theft does not relieve the pledgee from responsibility it does not of itself afford a presumption of

[1] Drake v. White, 117 Mass. 10.

[2] Bank of British Columbia v. Marshall, 11 Fed. Rep. 19.

[3] Maury v. Coyle, 34 Md. 235; Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35; Second Nat. Bank v. Ocean Nat. Bank, 11 Blatchf. 362; Scott v. Crews, 2 S. C. 522; Abbett v. Frederick, 56 How. Pr. (N. Y.) 68; Jenkins v. Nat. Village Bank, 58 Me. 275; Winthrop Bank v. Jackson, 67 Me. 570, 24 Am. Rep. 56; Fleming v. Northampton Nat. Bank, 9 Fed. Cas. 264, 62 How. Pr. 177.

[4] § 404.

negl igence on his part.[1] Upon payment or tender of paymen by the pledgor, the failure of the pledgee to return the pledge throws upon him the burden of showing a good reason for not returning it, or else renders him liable for a conversion of it. To this extent the loss of the pledge by theft, like the loss of it in any other way, makes the pledgee *prima facie* responsible for the loss. But in the case of theft, as well as in case of a loss in any other way, the pledgee when called upon to return the pledge may show in defense that the loss occurred while he was in the exercise of due and ordinary care.

The exercise of ordinary diligence in the care and protection of the thing pledged is the requirement made of the pledgee by the common law.[2] It is the same requirement in this respect that is made of a warehouseman. If the property pledged has been taken by burglars who have broken into the pledgee's place of business, the question of the pledgee's liability is one of fact, whether he exercised ordinary diligence in his care of the property.[3]

§ 410. **The holder of collateral security is bound to take only ordinary care of it.** Thus if bonds payable to bearer be deposited with a bank as collateral security for a loan, and the bank using reasonable care and oversight places the bonds in its safe or vault, with other bonds and valuable papers of its own, and the vault is broken open by burglars, who remove its contents, including the collateral bonds, the bank is not liable for the loss. This general rule of the law of pledges is not changed by the giving of a receipt for the bonds by the bank to the debtor, "to be returned to him on the payment of his note." Such a receipt amounts to no more than would be implied by law. It does not make the bank insurers of the bonds, and bound to keep and return them, whatever may

[1] Story on Bailm., §§ 334–338; 2 Kent's Com. 580; Schouler on Bailm., 191.

[2] Petty v. Overall, 42 Ala. 145, 94 Am. Dec. 634.

[3] Abbett v. Frederick, 56 How. Pr. (N. Y.) 68; Arent v. Squire, 1 Daly (N. Y.) 347.

happen. The common law liability is not changed, and that requires only ordinary care of the securities pledged.[1]

§ 411. **What the ordinary care required of a pledgee of such securities is,** depends upon a great variety of circumstances, and is to be determined by a consideration of all the facts. The question is materially affected by the value of the securities, the liability to loss by fire or theft, and the precaution taken against these.[2] It is not enough for the creditor to say that he took the same care of the securities held in pledge that he took of like securities of his own; nor that he lost at the same time, by the same fire or theft, similar securities of his own to a larger amount. There is, however, in the absence of all evidence upon the subject, a presumption in his favor that he has used ordinary diligence as to his own goods; but when evidence to the contrary is introduced he must go farther, and show affirmatively that he used ordinary diligence and care in protecting the lost securities, both his own, and those pledged to him.[3]

[1] Jenkins v. Nat. Village Bank, 58 Me. 275; Winthrop Bank v. Jackson, 67 Me. 570, 24 Am. Rep. 56; Mills v. Gilbreth, 47 Me. 320, 74 Am. Dec. 487; Second Nat. Bank of Erie v. Smith, 8 Phila. (Pa.) 68, 3 Brewst. (Pa.) 9, 13. Judge Sharswood, in this case, said: "It was at one time supposed, and it had a very eminent jurist to sustain it (Sir William Jones) that private theft (theft as distinguished from public robbery, taking by violence or force)—private theft was presumptive evidence of ordinary neglect; that the pawnee, for instance, could not come in and say: 'my pocket was picked,' or 'this article was stolen out of my house.' He must prove distinctly and positively that he could not help it, and that he had taken every precaution. That doctrine, however, has been repudiated; and it may be stated now as the rule at present received and acted upon, that theft *per se*, or the mere fact of theft, establishes neither responsibility nor irresponsibility in the bailee or pawnee. It is like any other loss. If the theft is occasioned by any negligence, the bailee is responsible; if without any negligence on his part, he is discharged from responsibility. Ordinarily diligence is not disproved even presumptively, by theft, but the proper conclusion must be drawn by weighing all the circumstances of a particular case. And see Dearborn v. Union Nat. Bank of Brunswick, 61 Me. 369; Schwerin v. McKie, 51 N. Y. 180, 10 Am. Rep. 581.

[2] Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35.

[3] Second Nat. Bank of Erie v. Smith, 8 Phila. (Pa.) 68, 3 Brewst. (Pa.) 9, per Sharswood, J.; Dearborn v. Union Nat. Bank, 58 Me. 273, 61 Me. 369. See this last case as to form of action, whether *trover* or *assumpsit*.

Where a loan was secured by the delivery of a warehouse receipt for certain wet-salted calf skins, in an action by the pledgee to recover the loan the pledgor sought as a counter claim damages resulting from a deterioration of the calf skins while in the warehouse, alleged to have been caused by the pledgee's neglect to care for them. "It appeared that the pledgee gave no personal attention to the skins while in the warehouse, and exercised no supervision over them; that the pledgor had free access to them and frequently went to the warehouse and examined them. The skins were all piled together, and the injury was caused by the heating of those in the center of the pile; this did not appear upon the surface of the pile. When the pledgor discovered that the skins were injured he called the pledgee's attention to it and advised that they be resalted or tanned; the pledgee declined to do either; the pledgor also proposed to take them to his own warehouse and treat them. The pledgee did not consent, but suggested that the pledgor pay the debt and take skins. It was held, that while the legal title to the property was vested in the pledgee and the warehousemen were their bailees, the pledgor had at least an equal interest in the preservation of the property, the bailment being for the mutual benefit of the parties, and no duty devolved upon the former to cause it to be handled over and inspected; that the pledgee was not required to permit the pledgor to take it to his own warehouse, and whether, under the circumstances, it was his duty to take some action for its preservation after being advised of its deterioration, for neglect to perform which he was liable, was properly submitted to the jury."[1]

§ 412. **Ordinary diligence is a relative term,** and as applied to the care of a pledge denotes that care which men of common prudence generally take of like articles of their own, at the time and in the place where the question arises. This point was discussed in a case[2] where bank bills pledged to

[1] Willets v. Hatch, 132 N. Y. 41, 30 N. E. Rep. 251.

[2] Scott v. Crews, 2 S. C. 522, 535.

bankers were deposited by them in their safe, and were stolen by robbers who broke open the safe at night and carried away the bills. The pledgor when sued for the debt set up by way of counter claim the value of the pledge not returned, and claimed that the pledgees could not be said to have exercised ordinary care, unless it should be found that they had availed themselves of all the means for securing the safety of the pledge when deposited in their safe. The court, in refusing to require this degree of diligence, said: "If the law requires the bailee of a pledge to provide himself with all the mechanical improvements of the age, to protect him from the consequences of a loss of the property by theft, then, instead of being bound to ordinary care, he would be held to extraordinary diligence, which is only required in a bailment for the sole benefit of the bailee. * * * Where one holds himself out to the community as a banker, the public is to assume that he has the means of protecting the property confided to his care by the nature of his business, and that he is furnished with all that is necessary to enable him to use ordinary diligence in the charge which he has invited. The appliances necessary to the diligence must have a relative reference to the community in which he lives. The safety of the article confided to him might possibly be better secured by watchfulness and vigilance than by bars and bolts. It is a common practice in large cities for banking houses to employ a watchman, and yet it would scarcely be contended that these plaintiffs were guilty in such omission, if not a single bank in the place in which they lived thought it necessary to avail itself of such a security. * * * If ordinary negligence is to be inferred from the absence of the appliances which the mechanical skill of the age has invented, without regard to the place, there would be no discrimination between a loss by a bailee through theft in an extensive city or a secluded village. * * * There is no doubt that ordinary diligence must be measured, at this day, by a different standard from that which would have been applied twenty years ago, but looking to the period

and the place the jury are to determine if it was properly exercised under the surrounding circumstances."

§ 413. **In regard to the burden of proof of negligence on the part of the pledgee** in the care of the property when suit is brought by the pledgor to charge him with the loss, it would seem that at the outset the pledgee would be presumed to have acted in accordance with his trust, until the contrary is shown. The law will not presume negligence. But when the pledgor has proved the contract of pledge and the delivery of the goods to the pledgee, the burden is upon the latter to show the loss of them and the manner of the loss; for with him rests a knowledge of the facts and circumstances attending the loss. "If, when these facts and circumstances are thus disclosed, and the evidence bearing upon the question of negligence is all out, the scale is evenly balanced, the presumption that the bailee does his duty will leave the case with him."[1] Thus where one has pledged to a bank a negotiable bond, and claims damages for the bank's failure to return security, after the latter has proved the loss of it through larceny by persons not connected with the bank, the burden of proof to show negligence on its part lies with the pledgor.[2]

§ 414. **A national bank in taking collateral security for a loan assumes the ordinary liability of a pledgee** for the care of the collaterals. The taking of stocks and bonds as collateral security is incident to conducting a general banking business, and is therefore a power incident to banks organized under the National Banking Act. Such a bank having the power to take such collaterals is liable, as an ordinary bailee, for failure to exercise proper and ordinary care to prevent their loss.[3]

[1] Mills v. Gilbreth, 47 Me. 320, 326, per Rice, J., 74 Am. Dec. 487; and see Clark v. Spence, 10 Watts (Pa.) 335.

[2] Winthrop Bank v. Jackson, 67 Me. 570, 572, 24 Am. Rep. 56.

[3] Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35; Canfield v. State Nat. Bank of Minneapolis, 1 N. W. Rep. 173, Thompson's Nat. Bank Cases, 312; Shoemaker v. National Mechanics' Bank, 2 Abb. (U. S.) 416, Thompson's Nat. Bank Cases, 169.

§ 415. **A bank is liable for a fraudulent conversion by its officers of collateral securities pledged to it** for loans, if the want of ordinary care and vigilance affords the opportunity for such conversion. The receiver of the Bankers' and Brokers' Association having brought an action to recover the amount of a loan made by the association, the defendant admitted the loan, but showed that he had deposited with the association, as collateral security, certain railroad bonds and bank stocks, and that he had tendered the amount of the loan and demanded a return of the collaterals before the commencement of the action. It appeared that the president of the association had taken these collaterals, pledged them for his own debts, and subsequently absconded. The charter of the association committed the management of it to thirteen trustees, who by the by-laws were required to hold monthly meetings. Its property and securities were in the charge of a manager, who was one of the trustees. For several months prior to his default the president of the association, who was a broker, and a large borrower of money, had been in the habit of sending to the office of the association, and, against the objection of the manager, taking away and using its securities, and returning such of them as from time to time the manager sent for. The defendant's securities were taken in this way. The trustees did not hold meetings, as provided for by the by-laws, made no examinations of the securities, and took no substantial oversight of the affairs of the association, and no measures for the safe custody of its property. It was held that the association was liable for the securities, and that the defendant might set off their value in this action. Chief Justice Church,[1] delivering the judgment of the Court of Appeal of New York in this case, after referring to several cases cited by the plaintiff, which were cases of special deposit, without contract or reward,[2] said: "With the doctrine of

[1] Cutting v. Marlon, 6 Abb. (N. Y.) N. C. 388, 17 Hun 573; affirmed by Court of Appeals, 78 N. Y. 454, 19 Am. Law Reg. (N. S.) 176.

[2] These cases were: Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Giblin v. McMullen, L. R. 2 P. C. Cases, 317, 318; Scott v. Nat. Bank of Chester Valley, 72 Pa. St. 471, 13 Am. Rep. 711.

these cases no fault can be found. If a loss occurs, even through the larceny of agents or employes, the depositary is not liable, unless gross negligence is shown. The distinction between those cases and this is manifest. This case was not a special deposit. The corporation occupied at least the position of bailee for hire, and was under obligation to exercise at least ordinary care. The finding that such care was not exercised was justified by the evidence. The president was a notorious dealer and speculator in stocks. He had been engaged for many months in abstracting securities held by the bank for his private purposes, and he had done this not secretly, but openly and publicly. The manager was also a trustee, knew that these acts were being done, and it is difficult to see why his knowledge and neglect are not imputable to the corporation itself. If all the trustees, or a majority, had known of these transactions, and had not at once removed the president, or otherwise prevented their recurrence, they would have been guilty of culpable dereliction of duty. A corporation is represented by its trustees and managers. Their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this, but in addition, they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs. The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practices, especially those so openly committed and easily detected as these are shown to have been. Here was no supervision, no meetings, no examination, no inquiry. There was actual knowledge on the part of the managing trustee, and his silence and inaction, without adopting any measures of prevention, amounted to acquiescence in the wrong, and it would not be a strained inference, from the business of the president and the publicity of the acts, and other circumstances, that the other trustees either had reason to suspect what was going on, or if not, that they were grossly negligent of their duties. We concur with the learned trial

judge, 'that a system of management of a banking house in which such conduct of its officers was permitted, was a breach of duty, and grossly negligent towards its dealers and persons having stocks and bonds in its keeping.' It is argued that the negligence shown was not the *proximate* cause of the loss, and that with the utmost vigilance it would have been possible for the president, who had access to the vault, to have abstracted the securities. This may be true, but the position is not tenable. The exercise of ordinary care would have discovered the wrongful practices, because they were not secret, and were actually known to the managing trustee, and if known, the trustees had the power, and it would have been their duty, to have effectually prevented it, and the presumption is that they would have done so. The negligence related to the cause of the loss, viz., the abstraction of collaterals for private use, which ordinary vigilance would have discovered and prevented."

A banking company managed so negligently by its directors or trustees as to tempt and allow an officer of the company to convert to its own use bonds and stocks pledged to it by a customer for a loan, will be held liable to the customer therefor. Such a company is bound to conduct its business with ordinary circumspection, and so that securities pledged to it shall be reasonably protected against misapplication by its servants and agents.[1]

§ 416. **A creditor once having become liable for collaterals received on deposit continues liable for them even after the debt has been paid,** if the contract of bailment remains unchanged. A customer of the Third National Bank of Baltimore voluntarily deposited with the bank a large amount of bonds as security for his existing and future indebtedness to it.

See, also, similar cases: First National Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Smith v. First Nat. Bank of Westfield, 99 Mass. 605, 47 Am. Dec. 59; Wiley v. First Nat. Bank of Brattleboro, 47 Vt. 546, Thompson's Nat. Bank Cases, 905, and note, 19 Am. Rep. 122.

[1] Cutting v. Marion, 6 Abb. N. C. (N. Y.) 388, 57 How. Pr. 56.

The customer kept a large deposit account with the bank, but sometimes obtained discounts on the security of the collaterals; and sometimes, when he wanted money for a very short time, he obtained call loans by checks on the security of these collaterals. Sometimes he owed the bank nothing, but left the bonds with it on deposit. The bank considered the account a desirable one, and the arrangement by which every liability was secured by these collaterals a very advantageous one. This arrangement had continued several years, when the vault and safe of the bank were broken into by burglars and robbed of a large amount of money and securities. The burglars obtained entrance through the walls of an adjoining building, and through the walls of the vault and safe by the use of appropriate and ingenious tools. Among the valuables stolen were money belonging to the bank, securities belonging to the family of the president of it, and the bonds deposited as collateral security by the customer before spoken of. At the time of the robbery the customer was not indebted to the bank, having paid his last debt a few weeks previously. He had, however, left the bonds in the bank under the original agreement, as collateral security for any indebtedness he might thereafter incur to the bank. In a suit by the customer to recover the value of the bonds, upon the question of fact whether there had been any want or omission of ordinary care and diligence on the part of the bank, from which the loss resulted, the jury found against the bank. The court of appeals of Maryland[1] held, as matters of law, that the original contract of bailment was valid and binding, and that the obligation of the bank for the safe custody of the collaterals did not cease when the plaintiff's debt had been paid; that the jury were rightly instructed that the bank was responsible for the bonds, if they were stolen, in consequence of its failure to exercise such care and diligence in their custody or keeping, as, at the time, banks of common prudence, in like situation and business, usually bestowed in the custody and keeping of similar property, and that the care and diligence ought to have

[1] Third Nat. Bank v. Boyd, 44 Md. 47, 22 Am. Rep. 35.

been such as was properly adapted to the preservation and protection of the property, and should have been proportioned to the consequence likely to arise from any improvidence on its part.

§ 417. **In relation to the measure of damages** there has been some difference of opinion, whether the value of the securities should be taken as of the time when they were lost, or as of the time when a demand is made for their return. Inasmuch as the value of collateral securities such as stocks and bonds is liable to large fluctuations, the time fixed for ascertaining it, may become of much importance, and has been the subject of considerable discussion. The rule of damages in actions of trover is generally applied by analogy to cases of the loss of the collateral securities through want of care on the part of the creditor; but the rule of damages in trover is by no means uniform in the different states.

In Maryland the courts, following the rule of damages prevailing in that state in actions of trover, making the measure of damages the value of the property at the time of conversion, hold that the true measure of damages for the failure of a creditor to exercise due care in the custody of bonds deposited with him as collateral security is their market value at the time of their loss. The legal obligation of the creditor in such case is declared to be to keep the bonds safely, and to return them when the debt secured was paid.[1] "Strictly," say the court, "this obligation could not be discharged by the payment of their value in money; after the bonds had been lost, and it had become impossible to return them, there was no necessity for a demand, and when made, it could have no significance or effect in determining the rights of the parties. These had become fixed when the breach occurred by the loss of the bonds, and in our judgment the proper measure of damages is their value computed at that time."

According to other authorities, if securities be lost through

[1] Third Nat. Bank v. Boyd, 44 Md. 47, 66, 22 Am. Rep. 35. The case of Maury v. Coyle, 34 Md. 235, is distinguished.

the negligence of the creditor, the rule of damages is their value at the time their return is properly demanded.[1]

III. *His Right to Assign the Pledge.*

§ 418. **The pledgee may assign his interest in the pledge** and the assignee will stand in his place.[2] The lien of a pledge

[1] Second Nat. Bank v. Smith, 8 Phila. (Pa.) 68, 3 Brew. 9.

[2] Mores v. Conham, Owen 123; Johnson v. Stear, 15 C. B. (N. S.) 330; Donald v. Suckling, L. R. 1 Q. B. 585, 618; Ratcliff v. Davis, Yel. 178, 1 Bulst. 29, Cro. Jac. 244; Demainbray v. Metcalfe, 2 Vernon 690; Mann v. Shiffner, 2 East 523; McCombie v. Davies, 7 East 6, 7; Halliday v. Holgate, L. R. 3 Exch. 299; Talty v. Freedman's Sav. & Trust Co., 93 U. S. 321; Warner v. Martin, 11 How. 209; Oregon & Transcontinental Co. v. Hilmers, 20 Fed. Rep. 717; Philler v. Yardley, 62 Fed. Rep. 645, 649.

Arkansas: Whitney v. Peay, 24 Ark. 22.

California: Williams v. Ashe, 111 Cal. 180, 43 Pac. Rep. 595; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. Rep. 84; Dewey v. Bowman, 8 Cal. 145.

Connecticut: Bulkeley v. Welch, 31 Conn. 339; Calkins v. Lockwood, 17 Conn. 154, 174, 42 Am. Dec. 729; Shelton v. French, 33 Conn. 489; Stearns v. Bates, 46 Conn. 306.

Illinois: Belden v. Perkins, 78 Ill. 449.

Indiana: Hawkins v. Fourth Nat. Bank, 150 Ind. 117, 49 N. E. Rep. 957.

Iowa: Rand v. Barrett, 66 Iowa 731, 24 N. W. Rep. 530.

Maryland: Baltimore Ins. Co. v. Dalrymple, 25 Md. 269.

Massachusetts: Jarvis v. Rogers, 15 Mass. 408; Whitaker v. Sumner, 20 Pick. 399.

Michigan: Drake v. Cloonan, 99 Mich. 121, 123, 57 N. W. Rep. 1098, quoting text.

Mississippi: Boswell v. Thigpen, 75 Miss. 308, 317, 22 So. Rep. 823.

Nebraska: Waddle v. Owen, 43 Neb. 489, 61 N. W. Rep. 731.

Nevada: Gass v. Hampton, 16 Nev. 185.

New Hampshire: Goss v. Emerson, 23 N. H. 38; Bailey v. Colby, 34 N. H. 29, 35, 66 Am. Dec. 752; Esty v. Graham, 46 N. H. 169.

New York: McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Bush v. Lyon, 9 Cow. 52, 56; Chapman v. Brooks, 31 N. Y. 75; Bennett v. Austin, 81 N. Y. 308; Duncomb v. N. Y., H. & Northern R. Co., 84 N. Y. 190, 208.

Pennsylvania: Thompson v. Patrick, 4 Watts 414; Ashton's Appeal, 73 Pa. St. 153.

Tennessee: National Bank v. Winston, 5 Baxt. 685.

Vermont: Bullard v. Billings, 2 Vt. 309.

"There is a great difference in this respect between a pledge and a lien. The authorities are clear that a right of lien, properly so called, is a mere personal right of detention, and that an unauthorized transfer of the thing does not transfer that personal right. The cases which established in England before the factors' act, that a pledge by a factor gave his pledgee no right to retain the goods even to the extent to which the factor was in ad-

can not be separated either from the possession of the pledge, or from the debt, so that to make an effectual sale both must pass to the assignee.[1] Therefore if the pledge alone be assigned, unless it be negotiable paper or a chose in action having the legal qualities of such paper, payment or tender may be made to the original pledgee who retains the debt, and then the assignee of the pledge is liable in trover for the pledge.[2] As the security, however, is a mere incident of the principal debt, just as a mortgage is a mere incident of the debt secured,[3] an assignment of the debt passes either a legal or equitable interest in the pledge, unless it is otherwise agreed between the parties.[4]

vance, proceed on this ground." Note to Hubbell v. Drexel, 21 Am. Law Reg. (N. S.) 457, citing Daubigny v. Duval, 5 T. R. 604, 606, where Buller, J., said that "a lien is a personal right and can not be transferred to another," and Legg v. Evans, 6 M. & W. 36, 42, where Parke, B., said: "A lien is a personal right which can not be parted with, and continues only so long as the possessor holds the goods;" and McCombie v. Davies, 7 East 6, where Lord Ellenborough remarked, that "nothing could be clearer than that liens were personal, and could not be transferred to third persons by any tortious pledge of the principal's goods." See § 331.

[1] Whitney v. Peay, 24 Ark. 22; Johnson v. Smith, 11 Humph. (Tenn.) 396; Bullard v. Billings, 2 Vt. 309. See, also, Lewis v. Varnum, 12 Abb. Pr. (N. Y.) 305.

[2] Ratcliff v. Davis, Yel. 178, and see Felt v. Heye, 23 How. Pr. (N. Y.) 359, 362, per Ingraham, C. J.; Sheridan v. Presas, 18 Misc. (N. Y.) 180, 41 N. Y. Supp. 451; Usher v. Van Vranken, 48 App. Div. (N. Y.) 413, 63 N. Y. Supp. 104.

[3] Jones on Mortgages, §§ 813–822; Southerin v. Mendum, 5 N. H. 420; Whittemore v. Gibbs, 24 N. H. 484.

[4] Cole v. Bank of Montreal, 39 U. C. Q. B. 54, 74; Esty v. Graham, 46 N. H. 169; Stearns v. Bates, 46 Conn. 306, 312; Homer v. Savings Bank, 7 Conn. 478; Hawkins v. Fourth Nat. Bank, 150 Ind. 117, 49 N. E. Rep. 957; Waddle v. Owen, 43 Neb. 489, 61 N. W. Rep. 731.

See to the contrary, however, Johnson v. Smith, 11 Humph. (Tenn.) 396, where it was declared by the court that the analogy between a mortgage and a pledge does not hold in this matter. "The essential distinction is, that in the case of a mortgage, the right passes by the conveyance, and possession of the property is not essential to create or support the title. But, in the case of a pledge, the right is created and passes only by delivery or possession of the property pledged; and as the lien can not exist in favor of the pawnee, without possession of the pledge, so neither can it pass to the assignee of the debt, without being accompanied by the pledge." But would not the original pledgee ordi-

§ 419. **The pledge is not a distinct and independent right of property which is capable of being assigned by itself** aside from the debt. The pledgee can not separate his special property in the pledge from the debt secured by it, so that the debt shall be owned by one person and the pledge by another; and therefore it is held that the assignee of the pledge can not maintain an action to enforce the lien, unless he shows that he also owns the debt secured by the pledge.[1]

In some states it is provided by statute that pledges and collateral securities shall not be transferred separate from the debts secured.[2]

But the severance of the security from the debt and the assignment of the security for the purpose of enabling the assignee to bring an action upon it for the benefit of the pledgee are not unlawful, as the substantial interest in such case remains in the pledgee.[3]

§ 420. **The original contract of pledge is not put an end to by repledging the thing pledged,** and therefore the original pledgor can not recover it without having first paid or tendered the amount of his debt secured by the pledge. This subject was very fully and learnedly discussed in Donald v. Suckling before the court of Queen's Bench.[4] The earlier authorities

narily be regarded as holding possession of the pledge as the agent of his assignee?

[1] Van Eman v. Stanchfield, 13 Minn. 75; Williams v. Ashe, 111 Cal. 180, 43 Pac. Rep. 595.

[2] *Alabama:* Code 1896, § 947. Such assignment operates as a discharge of the pledge restoring the title to the pledgor. See Dexter v. McClellan, 116 Ala. 37, 50, 22 So. Rep. 461, where the assignment was not within the prohibition of the statute. The assignment is not utterly void, but the owner is armed by the statute with an election to affirm or disaffirm the transfer, and by affirming it the title to the securities is fully vested in the assignee. Pollak v. Janney, 100 Ala. 561, 13 So. Rep. 661.

Georgia: Code 1895, § 2143.

[3] Easton v. Hodges, 18 Fed. Rep. 677.

[4] L. R. Q. B. 585, 610. The subject of pledge in this case was debentures of a joint-stock company. These having been repledged, the pledgor sought to recover them in detinue with damages for their detention; but having made no tender of his debt secured by the debentures, it was held that he could not recover by Cockburn, C. J., Blackburn and Mellor, JJ., Shee, J., dissenting. The

were examined in detail by the several judges delivering separate opinions and a distinction recognized between a *pledge* and a *lien*, as regards the powers of a person entitled to the one or the other security, Mellor, J., saying: "I think that when the true distinction between the case of a deposit, by way of pledge, of goods, for securing the payment of money, and all cases of *lien* correctly so described, is considered, it will be seen that in the former there is no implication, in general, of a contract by the pledgee to retain the personal possession of the goods deposited; and I think that, although he can not confer upon any third person a better title or a greater interest than he possesses, yet, if nevertheless he does pledge the goods of a third person for a greater interest than he possesses, such an act does not annihilate the contract of pledge between himself and the pawnor; but that the transaction is simply inoperative as against the original pawnor, who upon tender of the sum secured immediately becomes entitled to the possession of the goods, and can recover in an action for any special damage which he may have sustained by reason of the act of the pawnee in repledging the goods; and I think that such is the true effect of Lord Holt's definition of a 'vadium or pawn' in Coggs v. Bernard;[1] although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged, and must use due diligence in the keeping of it, and says that the creditor is bound to restore the pledge upon payment of the debt, because, by detaining it after the tender of the money, he is a wrong-doer, his special property being determined; yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place. If the true distinction between cases of lien and cases of deposit by way of pledge be kept in mind, it will, I think, suffice to

ruling of the majority of the court in this case was reaffirmed by the unanimous judgment of the Exchequer Chamber in Halliday v. Holgate, L. R. 3 Ex. 299. Also, see, supporting the text, Drake v. Cloonan, 99 Mich. 121, 57 N. W. Rep. 1098; Reardon v. Patterson, 19 Mont. 231,234, 47 Pac. Rep. 956.

[1] 2 Ld. Raym. 909, 916.

determine this case in favor of the defendant, seeing that no tender of the sum secured by the original deposit is alleged to have been made by the defendant; and considering the nature of the things deposited, I think that the plaintiff can have sustained no real damage by the repledging of them, and that he can not successfully claim the immediate right to the possession of the debentures in question."

In the same case Chief Justice Cockburn to like effect said:[1] "The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action,—for nominal damages if he has sustained no substantial damages; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged. We are not dealing with a case of lien, which is merely the right to retain possession of the chattel, and which right is immediately lost on the possession being parted with, unless to a person who may be considered as the agent of the party having the lien for the purpose of its custody. In the contract of pledge, the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time. It seems to me that the contract continues in force, and with it the special property created by it, until the thing pledged is redeemed or sold at the time specified. The pawnor can not treat the contract as at an end until he has done that which alone enables him to divest the pawnee of the inchoate right of property in the thing pledged, which the contract has conferred on him."

[1] L. R. 1 Q. B. 585, 618.

§ 421. **There is ordinarily no implication in law that the pledgee shall keep the pledge in his own exclusive possession.**[1] The pledgor might stipulate that the pledgee should not assign the pledge; and the fact that the pledgor places a special value upon the article pledged, and has personal confidence in the pledgee, would be inducements for making such a stipulation so as to insure the safety and return of that particular article.

It has been suggested that an obligation on the part of the pledgee to keep the pledge in his own personal care may in some cases be inferred from the nature of the thing pledged, as in the case of a valuable work of art, which the pawnor may be perfectly willing to intrust to the custody of the pawnee, but would not have parted with on the terms that it should be passed on to others, and committed to the custody of strangers.[2]

But ordinarily all that the pledgor can require is that the property shall be returned to him in good condition upon the payment of the debt secured to the holder of the pledge, whether the holder be the pledgee or any one who has acquired his interests.

§ 422. **A pledgor can not, therefore, upon an assignment of the pledge by the pledgee with the debt secured, maintain an action of trover against him as for a conversion** of the property, though his assignee may have converted the pledge to his own use;[3] nor can the pledgor maintain replevin or detinue for the thing pledged in the hands of the pledgee's assignee without paying or tendering the debt secured by the pledge.[4] Such an action assumes an immediate right of pos-

[1] Edwards on Bailm., § 267; Cooley on Torts, 453; Donald v. Suckling, L. R. 1 Q. B. 585, 618; Talty v. Freedman's Saving & Trust Co., 93 U. S. 321; Hopper v. Smith, 63 How. Pr. (N. Y.) 34; Lewis v. Mott, 36 N. Y. 395.

[2] Per Cockburn, C. J., in Donald v. Suckling, L. R. 1 Q. B. 585, 618.

[3] Goss v. Emerson, 23 N. H. 38; Bailey v. Colby, 34 N. H. 29, 66 Am. Dec. 752; Steiger v. Third Nat. Bank, 6 Fed. Rep. 569.

[4] Halliday v. Holgate, L. R. 3 Ex. 299; Johnson v. Stear, 15 C. B. N. S. 330; Evans v. Potter, 2 Gall. 13; Lewis v. Mott, 36 N. Y. 395; Lane v. Bailey, 47 Barb. (N. Y.) 395.

session in the pledgor; but he has no such right without first paying off the debt. "It is a contradiction in fact, and would be to call a thing that which it is not, to say that a pledgee consents, by his act, to revest in the pledgor the immediate interest or right in the pledge, which, by the bargain, is out of the pledgor and in the pledgee."[1]

A pledgee may sell or assign the thing pledged, and the pledgor can not recover the property of the purchaser without paying or tendering him the sum due thereon.[2] The pledgee may also transfer his interest in the pledged property conditionally by way of a mortgage or pledge to another, and the transferee will hold the pledge in the same right as the original pledgee, until the debt of the original pledgor is paid.[3]

If in any case the pledgor is entitled to an action against the pledgee making a sale or repledge, that is wholly inconsistent with the contract of pledge, his proper remedy is not an action of detinue or conversion, but an action upon the case for the injury done to his legal right.[4] "If the pledgee deals with the pledge in a manner other than is allowed by

There are some cases not in accord with this general rule. Thus, in Neiler v. Kelley, 69 Pa. St. 403, and Work v. Bennett, 70 Pa. St. 484, trover was maintained for an illegal conversion of the thing pledged by selling or repledging it, though the defendant was allowed to recoup from the damages for the conversion the amount due him secured by the pledge. These cases do not, however, seem to be consistent with the earlier case, in the same state, of Thompson v. Patrick, 4 Watts 414.

Trover was also sustained in Merchants' National Bank v. Trenholm, 12 Heisk. (Tenn.) 520. In First Nat. Bank v. Boyce, 78 Ky. 42, 19 Am. Law Reg. (N. S.) 503, 39 Am. Rep. 198, the pledgor was allowed to maintain an action against a sub-pledgee without first tendering or paying the original debt; but the sub-pledgee was allowed a right of set-off against the original pledgor.

[1] Per Willes, J., in Holliday v. Holgate, L. R. 3 Ex. 299, 302.

[2] See § 571a; Talty v. Freeman's Savings & Trust Co., 93 U. S. 321; Thompson v. Patrick, 4 Watts (Pa.) 414; Bradley v. Parks, 83 Ill. 169; Belden v. Perkins, 78 Ill. 449; Steiger v. Third Nat. Bank, 6 Fed. Rep. 569; Van Schaick v. Ramsey, 90 Hun (N. Y.) 550, 35 N. Y. Supp. 1006, 70 N. Y. St. Rep. 666; Gruman v. Smith, 81 N. Y. 25.

[3] M'Combie v. Davies, 7 East 6; Ratcliff v. Davis, 1 Bulst. 29, Yel. 178, Cro. Jac. 244; Jarvis v. Rogers, 15 Mass. 389; National Bank v. Winston, 5 Baxt. (Tenn.) 685; Lewis v. Mott, 36 N. Y. 395.

[4] Donald v. Suckling, L. R. 1 Q. B. 585, 618, per Blackburn, J.

law for the payment of his debt, then in so far as by disposing of the reversionary interest of the pledgor, he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor.'"[1]

If a pledgee of a negotiable instrument sells or trades it to another for bank stock, the conversion takes place at the time of the absolute trade and wrongful disposition and notice thereof to the pledgor.[2]

A pledgee who exchanges the property pledged for other property exceeds his authority, and it is optional with the pledgor either to adopt or repudiate the exchange.[3]

§ 423. **But the pledgee can ordinarily assign no greater right than he himself possesses.** This is always the case when the pledge is a chattel which has been pledged in the usual way by delivery without a formal conveyance of the legal title. The rule is otherwise, however, when the thing pledged is a chose in action like a certificate of stock which is pledged by a transfer of the legal title; the rule generally prevailing being that a purchaser from the pledgee, or his sub-pledgee, may acquire a better title to such property than the original pledgee had, so that the pledgor is precluded from redeeming upon paying the amount of his debt secured by the pledge. This is upon the ground that the pledgor has intrusted to his pledgee not merely the possession of the property, but also the complete title thereto, and that the pledgor is thereby estopped to say that such pledgee is not the owner, and has not the power to transfer a complete and unconditional title to any one else.[4]

If the pledge be stock in a corporation, the pledgee's assignee can claim as against the corporation no greater interest in the stock than the owner had at the time of the assignment. Thus, if the stock is only partly paid up, and the corporation

[1] Halliday v. Holgate, L. R. 3 Ex. 299, per Willes, J.

[2] Walley v. Deseret Nat. Bank, 14 Utah 305, 47 Pac. Rep. 147.

[3] Strong v. Adams, 30 Vt. 221, 73 Am. Dec. 305.

[4] Luckett v. Townsend, 3 Tex. 119, 49 Am. Dec. 723.

holds the owner's note for the residue payable on call, such pledgee can only claim, as against the owner, the proportion of the stock paid up at the time he received the certificate, though the owner may have afterwards completed the payment.[1]

§ 424. **Of course a pledgee of negotiable paper can always, until its maturity, give a good title to it,** discharged of the equities of the pledgor.[2] If the pledge be non-negotiable paper it is subject to the same defenses in the hands of the assignee that it was in the hands of the pledgee.[3] A reservation in a bond or note of the right to pay the same at any time before maturity, by taking from it the element of certainty as to time of payment, which is one of the essentials of negotiability, makes the paper non-negotiable.[4]

§ 425. **A payee of a negotiable note holding other notes as collateral security, may lawfully transfer the collateral notes to an indorsee of the principal note,**[5] although he has given his debtor a written undertaking to redeem the collaterals; and if the indorsee to whom the securities are transferred, wrongfully converts them to his own use, the original payee is not liable in trover for such conversion.[6] The assignee of the principal debt and the collateral securities holds the latter upon the same terms that the original pledgee held them.[7] So long as nothing is done to deprive the pledgor of his right to redeem, on payment of the amount due on the principal debt, he is not injured, and can not complain of the assignment.[8]

An accommodation indorser of a promissory note agreed with the maker that it should be "used" only at a certain

[1] Cherry v. Frost, 7 Lea (Tenn.) 1.

[2] See § 94; Coit v. Humbert, 5 Cal. 260, 63 Am. Dec. 128.

[3] Chouteau v. Allen, 70 Mo. 290.

[4] Chouteau v. Allen, 70 Mo. 290; Way v. Smith, 111 Mass. 523; Hubbard v. Mosely, 11 Gray (Mass.) 170, 71 Am. Dec. 698.

[5] Chapman v. Brooks, 31 N. Y. 75; Waddle v. Owen, 43 Neb. 489, 61 N. W. Rep. 731.

[6] Goss v. Emerson, 23 N. H. 38.

[7] Ponce v. McElvy, 47 Cal. 154; Dupré v. Fall, 10 Cal. 430; Loud v. Burke, 22 Gratt. (Va.) 254; Fant v. Miller, 17 Gratt. (Va.) 187.

[8] Chapman v. Brooks, 31 N. Y. 75.

bank. That bank, with knowledge of the agreement, allowed the maker to draw, from time to time, sums of money, and retained the note as collateral security. It was held that the bank was entitled to dispose of its claim against the maker, and to transfer the note as collateral security therefor.[1] Although a person takes a promissory note given as collateral security for a debt less in amount than the face of the note, with the intent to sell the note for its face value, this does not preclude him from maintaining an action on the note for the amount of the debt.[2]

§ 426. **A pledgee may release a portion of the goods pledged,** and such release, if made to the pledgor, or, with his consent, to his assignee, does not affect the pledgee's lien upon the remainder of the property, or his right of action against his debtor upon the personal obligation. Moreover, the pledgee may release a portion of the property pledged to the pledgor's assignee upon receiving from him a proportionate part of the debt secured, without affecting the pledgee's rights against the pledgor.

A firm having pledged several cases of goods for a debt, dissolved the partnership, and conveyed to a third person all the partnership property, in consideration that he would pay the partnership debts. The purchaser paid a portion of the debts to the pledgee, and received what was supposed to be a proportionate part of the goods, though, in fact, this part of the goods was the much more valuable portion. Upon the insolvency of the purchaser the pledgee made demand upon the pledgors for the balance of the debt, and caused the rest of the goods to be sold, and himself purchased them. It was held that his release of a portion of the goods was not such a dealing with, or disposition of his collateral security, as to make him liable to account with the pledgors for any greater sum than that he received from their assignee.[3]

[1] Proctor v. Whitcomb, 137 Mass. 303.

[2] Proctor v. Whitcomb, 137 Mass. 303, citing National Pemberton Bank v. Porter, 125 Mass. 333; Atlas Nat. Bank v. Savery, 127 Mass. 75; Proctor v. Whitcomb, 134 Mass. 428.

[3] Faulkner v. Hill, 104 Mass. 188.

§ 427. **Upon the death of the pledgee his right to hold the pledge passes to his personal representative,** who may hold and enforce the pledge in the same manner, and to the same extent, as the creditor himself might if he were living.[1]

§ 428. **In several states it is made a criminal offense to sell or repledge collateral securities,** without the consent of the pledgor. Thus, in Massachusetts[2] it is enacted that whoever, holding any collateral security deposited with him for the payment of a debt which may be due to him, sells, pledges, lends, or in any way disposes of the same before such debt becomes due and payable, without the authority of the party depositing the same, shall be punished by fine not exceeding five hundred dollars, or imprisonment in the state prison or jail not exceeding two years.[3] Whoever, with intent to defraud, buys, receives, or aids in the concealment of personal property, knowing the same to be hired, leased or held as collateral security, shall be punished by fine not exceeding one hundred dollars, or imprisonment in the jail not exceeding one year.

In Pennsylvania[4] it is provided that it shall not be lawful for any person or persons, bank, savings fund, building association, or any corporation, to repledge or rehypothecate any stocks, bonds, or other securities, received by any of them for money lent and borrowed, during the continuance of the contract of hypothecation or pledging of such securities; and such repledging or rehypothecation, without the consent of the party pledging the same, is hereby declared a misdemeanor, triable in the courts of quarter sessions, and on conviction thereof, any person or persons, or the officers of any corporation, violating the provisions of this act, shall be sentenced to a fine

[1] Henry v. Eddy, 34 Ill. 508.

[2] Pub. Stats. 1882, c. 203, §§ 72, 73.

[3] The offense of disposing of collateral security before the debt is due, is not indictable as embezzlement; but only under this statute. Commonwealth v. Butterick, 100 Mass. 1. But one fraudulently disposing of collateral security taken to indemnify him as indorser of a note, after the note has been paid by the maker, may be indicted for embezzlement. Commonwealth v. Butterick, 100 Mass. 1.

[4] Laws 1878, p. 155, No. 200. Act of May 25th, 1878.

not less than five hundred nor more than five thousand dollars, and undergo imprisonment for a period not exceeding five years, or both, or either, at the discretion of the court before which such person shall be prosecuted.

In 1881[1] this statute was modified by a proviso that it should not be construed to prevent brokers from pledging or hypothecating stock or other securities which they have purchased, in whole or in part, with their own money or credit for others, and for which they have not been wholly reimbursed by the parties for whom such stocks or other securities have been purchased.

IV. *His Right of Action for a Conversion of the Pledge.*

§ 429. **A pledgee from whom a pledged chattel has been wrongfully taken** may recover it by replevin,[2] or may recover its value from the person who has converted it.[3] His right of possession of the chattel enables him to maintain the former action; and his special property in it, the latter. The pledgee can recover the property or damages not only from the wrongful taker but from any one to whom such wrongful taker has delivered it. Thus, if the pledge has been stolen from the pledgee, and delivered to an express company, such company is liable for the value of the property after a demand for it by the pledgee.[4]

§ 430. **The pledgee is entitled to the exclusive possession of the pledge, and may recover it or its value from the pledgor,** if he wrongfully repossesses himself of it.

If a pledgee has consented to a sale of the property by the person in possession of it, his right of action is for the pro-

[1] Act of June 10, 1881; P. L. 1881, 107.

[2] Noles v. Marable, 50 Ala. 366; Woodruff v. Halsey, 8 Pick. (Mass.) 333, 19 Am. Dec. 329; Brownell v. Hawkins, 4 Barb. (N. Y.) 491; Jones on Chattel Mortgages, § 447a; Fifth Nat. Bank v. Providence Warehouse Co., 17 R. I. 112, 118, 20 Atl. Rep. 203.

[3] United States Express Co. v. Meints, 72 Ill. 293.

[4] United States Express Co. v. Meints, 72 Ill. 293.

ceeds of such sale, and not for the property itself or its value. His remedy is by an action for money had and received, and not by trover.[1]

But if a pledgee deliver possession of the pledged goods to one who promises to pay his claim out of the proceeds of the goods when sold, and the latter transfers the goods to a commission merchant who advances him more than the amount subsequently realized from their sale, the pledgee can not claim any part of the proceeds from the commission merchant, because the latter did not take the goods subject to the pledgee's lien, or subject to the first taker's promise.[2]

§ 431. **A bill in equity will not lie by a pledgee against one intrusted with property** for the purpose of selling it, upon his refusal to pay over the proceeds to the pledgee; for there is a complete remedy by an action at law for money had and received.[3]

§ 432. **The measure of damages in an action against the pledgor or one acting under his authority for a conversion of**

[1] Taylor v. Turner, 87 Ill. 296.

[2] Black v. Bogert, 65 N. Y. 601.

[3] Taylor v. Turner, 87 Ill. 296, 302. The court say: "If by the allegation that the property was received upon a trust, the case may be brought within the jurisdiction of a court of chancery, we do not see why it might not be the same in every case of the bailment of personal property. And we do not see why, in like manner, all that large class of cases where the action for money had and received for another's use is maintained, might not be drawn within the jurisdiction of a court of equity by making the allegation of the receipt of the money in trust to pay the same over to another.

Trusts, though in general of a peculiar and exclusive jurisdiction in equity, are sometimes cognizable at law, as in the cases above mentioned and the one now before us; and when so cognizable and the remedy at law is adequate and complete as we regard it here, we think such remedy should be pursued, and that it should not be left with a plaintiff at his will by the selection of the forum, to deprive the defendant of the so much prized privilege of trial by jury which exists at law."

In Coleman v. Shelton, 2 McCord Ch. (S. C.) 126, 16 Am. Dec. 639, a bill in equity to enable a pledgee to enforce his lien upon property, which the pledgor had taken from him, was sustained. The prayer of the bill was that the pledgor be restrained from disposing of the property, and that it be sold for the payment of the debt secured.

But the pledgee could recover the property by replevin: and this legal

the pledge is in like manner the value of the pledge with interest from the time of conversion, unless such amount exceeds the sum due from him to the pledgee, in which case that sum is the proper measure of damages.[1]

§ 433. **In an action by a pledgee of goods against a third party for their conversion,** the measure of damages is the full value of the goods.[2] This rule is founded on the consideration that for all beyond the debt for which the goods are pledged, the pledgee is responsible to the pledgor.[3] Thus, if the goods held in pledge be seized and sold on execution by a creditor of the pledgor, without statutory authority, the measure of damages in a suit by the pledgee against the officer is the value of the property and not the amount of his demand secured by the pledge.[4] In such case the officer is a trespasser, and must be regarded as a stranger and therefore liable for the full value of the goods. But on the other hand, if the officer seize the goods in a lawful manner, he is to be regarded as acting in privity with the pledgor; and in that case the pledgee would not be answerable over for the surplus above the debt due to himself, and the officer would be answerable to the pledgee for only the value of his special interest in the goods. The solution of the question whether the officer is answerable to the pledgee for the full value of the goods or only for the value of his interest as pledgee, depends upon the question whether the officer is pursuing a proper and legal course in seizing the goods. If the pledgor has an interest which is subject to execution, and the officer properly levies upon this,

remedy being adequate, there would seem to be no occasion, or right even, to go into chancery for a remedy.

[1] Hurst v. Coley, 15 Fed. Rep. 645; Hay v. Riddle, 1 Sandf. (N. Y.) 248; Holmes v. Langston, 110 Ga. 861, 36 S. E. Rep. 251, 254; Russell v. Kearney, 27 Ga. 96; Bigelow v. Young, 30 Ga. 121; Jones v. Hicks, 52 Miss. 682.

[2] Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Ullman v. Barnard, 7 Gray (Mass.) 554; Pomeroy v. Smith, 17 Pick. (Mass.) 85; Baldwin v. Bradley, 69 Ill. 32; Benjamin v. Stremple, 13 Ill. 466; Treadwell v. Davis, 34 Cal. 601, 606, 94 Am. Dec. 770; United States Express Co. v. Meints, 72 Ill. 293; Swire v. Leach, 18 C. B. (N. S.) 479.

[3] Lyle v. Barker, 5 Binn. (Pa.) 457; Treadwell v. Davis, 34 Cal. 601, 606.

[4] Soule v. White, 14 Me. 436; Treadwell v. Davis, 34 Cal. 601, 606.

he is deemed to be acting in privity with the pledgor, and is liable to the pledgee only for the value of his special interest. On the contrary, if the pledgor has no interest that is subject to execution, or if the officer proceeds in an unlawful manner in seizing the goods, he becomes a trespasser, and is to be treated as a stranger, liable for the full value of the property.[1]

§ 434. **For an injury done by a stranger to the thing pledged,** or for a conversion of it by him, an action may be maintained either by the pledgor or by the pledgee. The former may maintain either an action of trespass or an action of trover by virtue of his general ownership of the property, and the latter may maintain either action by virtue of his special property in it and of his actual possession of it.[2] Moreover, either party is entitled to recover of a stranger the full value of the pledge; though when the pledgee makes such recovery he will hold the surplus above the amount required for the payment of the debt secured in trust for the general owner. But a judgment recovered by either the pledgor or pledgee is a bar to a suit by the other for the same cause of action;[3] and it would seem that a voluntary payment of damages to one would be a bar to a suit by the other.

§ 435. **In an action for money had and received by a pledgee of gold coin** to recover it, the damages must be limited to the amount of money with interest, and can not be increased by regarding the coin as merchandise; for this action would not lie at all if the coin be regarded as merchandise; and being for the recovery of money the coin must be treated as money.[4] In an action of trover it would seem that the measure of damages should be the value of the gold at the time of the conversion;[5] yet, in a Wisconsin case it was held that the judgment was limited to the number of dollars represented by the gold

[1] Treadwell v. Davis, 34 Cal. 601, 606, 94 Am. Dec. 770, following in part the language of Crockett, J.

[2] Jones on Chattel Mortgages, § 447a.

[3] Green v. Clarke, 12 N. Y. 343; Chesley v. St. Clair, 1 N. H. 189.

[4] Frothingham v. Morse, 45 N. H. 545.

[5] Per Bellows, J., in Frothingham v. Morse, 45 N. H. 545.

coin deposited as collateral, and that this judgment might be discharged in treasury notes.[1]

§ 436. **If the pledgor take the property pledged from the pledgee by replevin before the debt is satisfied,** the latter, under the laws of Missouri, is entitled, upon judgment in his favor, to damages to the extent of his interest in it, instead of taking back the property. The judgment in such case should be for the value of his interest, and not for the total value of the property, because this course settles the rights of the parties and leaves nothing open for further litigation between them.[2] But if judgment is entered for the full value of the property, and this exceeds the amount of the debt secured, the pledgee will hold the remainder of the money received, after satisfying his claim, to the use of the pledgor. Such judgment for the full value of the property does not determine the question of title to the property, but only the question of possession. The pledgee holds the money recovered by such judgment in place of the specific thing pledged. He has no better title to the money than he had to the thing pledged before that was wrongfully taken from him. He can not receive and retain the total value of the collateral to his own use.[3]

[1] Warner v. Sauk County Bank, 20 Wis. 492.

[2] Miles v. Walther, 3 Mo. App. 96; Dilworth v. McKelvy, 30 Mo. 149.

[3] Miles v. Walther, 3 Mo. App. 96.

CHAPTER XII.

RIGHTS AND LIABILITIES OF A PLEDGEE OF STOCK.

I. *His Rights and Liabilities as a Stockholder.*

§ 437. **The liability one incurs as a stockholder, by taking shares as collateral security,** is often a matter of importance. In general, it may be said that one to whom a certificate of stock has been issued absolutely, but in fact as collateral security, assumes the liabilities of a stockholder so far as concerns the creditors of the corporation, and must bear all the burdens that relation imposes. Having voluntarily assumed the relation of stockholder, it makes no difference that he has done so with a view to assist the corporation itself by a loan of money or credit.[1] The legal title to the stock being in him by his

[1] National Bank v. Case, 99 U. S. 628; Pullman v. Upton, 96 U. S. 328; *In re* Empire City Bank, 18 N.Y. 199; Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183; Crease v. Babcock, 10 Met. (Mass.) 525, 545, 34 Am. Dec. 61; Magruder v. Colston, 44 Md. 349, 22 Am. Rep. 47; Hale v. Walker, 31 Iowa 344, 7 Am. Rep. 137; Thompson's Liability of Stockholders, c. 13. See, also, Kellogg v. Stockwell, 75 Ill. 68; Moore v. Jones, 3 Woods 53; Ball Electric Light Co. v. Child, 68 Conn. 522, 37 Atl. Rep. 391. In National Bank v. Case, 99 U. S. 628, Mr. Justice Strong specifies the grounds of the pledgee's liability: "One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the

own procurement, a creditor of the corporation is not bound to seek out the equitable owner, and enforce the stockholder's liability against him. A pledgee in whom the legal ownership appears to be is subject to the same liabilities any other stockholder is subject to unless exempted by statute.[1] The pledgee remains liable as a stockholder even after the debt has been paid and the certificate of stock indorsed and delivered back to the pledgor, if the latter neglects to make a retransfer upon the books of the company. Until such retransfer the pledgee remains the legal owner, and the court will not look beyond the legal ownership in determining the liability of a stockholder, except, perhaps, in case there has been a fraudulent transfer by the real owner to avoid liability.[2] Even a statute declaring that the term "stockholder," as regards personal liability, shall apply not only to those appearing by the books to be such, but also to every equitable owner of stock standing in the name of another, would seem to be limited to cases where the registered owner is merely a nominal holder; such for instance, as a trustee who has invested funds of another in his own name, or perhaps a pledgee after he has given the pledgor a power of attorney to transfer the stock. But a pledgor, after transferring the stock, though having still an equitable interest, is not in any proper sense an owner. He has the same interest that he would have under an executory agreement to purchase stock before paying the price and obtaining a transfer.[3]

representations he has made. Another is that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership, and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder."

[1] Wheelock v. Kost, 77 Ill. 296; Aultman's Appeal, 98 Pa. St. 505; Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183; Simmons v. Hill, 96 Mo. 679, 685, 10 S. W. Rep. 61, 2 L. R. A. 476; Moore v. Jones, 3 Woods (U. S.) 53; Nat. Bank v. Case, 99 U. S. 628, 631; Pauly v. State Loan & T. Co., 165 U. S. 606, 612.

[2] Adderly v. Storm, 6 Hill (N. Y.) 624; Johnson v. Underhill, 52 N. Y. 203.

[3] *In re* Empire City Bank, 18 N. Y. 199, 225. See Richardson v. Abendroth, 43 Barb. (N. Y.) 162.

And so where a person loaned money to a national bank and received as collateral security a certificate of the bank's own stock, and he afterwards received dividends thereon, he was held liable as a stockholder.[1]

A pledgee holding shares of stock as security has the same right as any stockholder to maintain a bill against the corporation and its officers for relief against a misappropriation of the corporate funds, by which his security is impaired.[2]

§ 438. **A pledgee can not escape personal liability by transferring pledged stock to an irresponsible person** to hold for his benefit. Therefore, a bank which has taken the shares of another bank as collateral security for a loan, and has afterwards, while the latter bank was in a failing condition, transferred them on the books of the latter bank to one of its own clerks, with the understanding that he should retransfer them on request, is liable to contribute as a stockholder for the benefit of the creditors of the bank whose shares were taken in pledge.

§ 439. **But if the stock is transferred in the first instance to a third person,** to hold for the benefit of the pledgee, the latter is not responsible as a stockholder. And so where a borrower who had already obtained a loan from a warehouse company upon a transfer of gas stock to its president, desiring to obtain a further loan, sent to the company certificates of stock made out in the name of its president, but the board of directors objecting to certificates in this form on the ground that the company might be liable as a shareholder, at their request the president transferred the stock to an irresponsible person in the employment of the company; upon the subsequent insolvency of the bank, it was held in a suit to charge the company as a shareholder, that it was not liable as such, unless it had authorized or ratified the transfer to its president as a trans-

[1] Wheelock v. Kost, 77 Ill. 296; also Pullman v. Upton, 96 U. S. 328; Johnson v. Laflin, 5 Dill. 65.

[2] Green v. Hedenberg, 159 Ill. 489, 42 N. E. Rep. 851; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. Rep. 261.

fer to the company itself; and that whether it had authorized such a transfer was a question for the jury.[1]

§ 440. **If a pledgee of stock sell it in pursuance of a power of sale upon his debtor's default,** although he make the sale because he believes the corporation to be insolvent, and in order to escape personal liability as a stockholder, the sale is not voidable as having been made in fraud of the creditors of the corporation. It is a material element in such a case that the sale is made in pursuance of a contract of the parties made at the time of the transfer to the pledgee.[2]

§ 441. **The right to vote upon stock belongs to the person in whose name it is registered,** although he may have pledged it as collateral security by an assignment of the certificate.[3] The records of the corporation must necessarily determine who are its stockholders. Even after a stockholder has been declared a bankrupt and his property was vested in his assignee, he has the right to vote on stock still standing in his name.[4]

It follows from this that a pledgee of stock not transferred to his name on the books of the company, is not ordinarily regarded as so far the owner of stock as to be entitled to notice of the meetings of the corporation.[5] The pledgor still remains a member of the corporation and must be so treated.[6]

[1] Anderson v. Phila. Warehouse Co., 4 Fed. Rep. 130.

[2] Magruder v. Colston, 44 Md. 349, Thompson's Nat. Bank Cases, 554, 22 Am. Rep. 47; Holyoke Bank v. Burnham, 11 Cush. (Mass.) 183, 187.

[3] Becher v. Wells Flouring Mill Co. (C. C. D. Minn. 1880), 1 Fed. Rep. 276; *Ex parte* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; *In re* Barker, 6 Wend. (N.Y.) 509; Vowell v. Thompson, 3 Cranch C. C. 428; Franklin Bank v. Commercial Bank, 36 Ohio St. 350; Commonwealth v. Dalzell, 152 Pa. St. 217, 25 Atl. Rep. 535; State v. Smith, 15 Ore. 98, 14 Pac. Rep. 814, 15 Pac. Rep. 137, 386.

[4] State v. Ferris, 42 Conn. 560; Hawaiian Com'l & Sugar Co. v. Waikapu Sugar Co., 9 Hawaii 694.

[5] McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274.

[6] Merchants' Bank v. Cook, 4 Pick. (Mass.) 405.

In several states it is provided by statute that a pledgor of stock may represent it and vote upon it at all meetings of the stockholders, unless the right to vote be expressly given to the pledgee.

Colorado: Mills' Annotated Stats. 1891, § 496.

Delaware: 21 Laws (1899), c. 273, § 23.

Stock which a corporation itself owns can not be voted upon.[1]

District of Columbia: R. S. 1875, § 578.

Idaho Territory: R. Laws, 1875, p. 622, § 12.

Illinois: R. S. 1898, c. 32, § 24.

Indiana: Burns' R. S., § 3432.

Kentucky: G. S. 1899, § 552.

Maine: When the owner of stock in a corporation has transferred, mortgaged or in any way pledged the same to another for security merely, and it so appears in such transfer, mortgage or pledge and on the books of the corporation, such owner shall have the right to vote such stock in all meetings of the stockholders until his right of redemption ceases. Acts 1872, c. 69; R. S. 1883, c. 46, § 14.

Maryland: Until forfeiture, upon exhibiting a certificate in writing from the pledgee that the stock is held in pledge, the owner may vote. An executor, administrator, guardian, or trustee, holding stock may vote upon it. R. Code 1878, p. 316, § 13; 1 Pub. Gen. Laws, p. 289, § 13.

Missouri: R. S. 1899, § 947.

Nevada: Any stockholder, who has pledged his stock by delivery of the certificate, may nevertheless represent the same at all meetings and vote as stockholder. Comp. Laws 1873, vol. 2, § 3400.

New Hampshire: The pledgor of stock as collateral security is entitled to vote as a stockholder. G. L. 1878, p. 355, § 12; P. S. 1900, c. 149, § 21. A person holding stock in a corporation as executor, administrator, guardian, or trustee, and a person who has pledged his stock as collateral security, may vote thereon as a stockholder, upon producing, if his right is contested, evidence of his title satisfactory to the presiding officer. P. S., c. 149, § 21.

New Mexico: A pledgor of stock may represent the same at all meetings and vote thereon as a stockholder. Comp. Laws 1884, § 203.

New York: Every pledgor of stock standing in his name on the books of the corporation shall be deemed the owner thereof for the purpose of voting. 1 R. S. (Birdseye, 2d ed.), p. 655.

Pennsylvania: As between the pledgor and pledgee of capital stock pledged to secure a specific loan with a fixed period or periods of maturity, the right to vote shall be determined as follows: First, by the written agreement of the pledgor and pledgee. Second, in all other instances the pledgor shall be held to be the owner and entitled to the right to vote. 1 Brightly's Purdon's Dig. 1894, p. 416, § 62.

Washington Territory: Pledgor may vote as stockholder. Code 1896, § 2657; Codes & Stats. 1897, § 4264.

Wyoming Territory: The same provision here also. R. S. 1887, § 517.

[1] *Ex parte* Barker, 6 Wend. (N. Y.) 509; *Ex parte* Desdoity, 1 Wend. (N. Y.) 98, 99; Page v. Smith, 48 Vt. 266; American Railway-Frog Co. v. Haven, 101 Mass. 398.

Under a statute requiring the written assent of stockholders owning two-thirds of the capital stock of a corporation to authorize a mortgage of its property, the corporation itself can not assume to sign as the owner of certain shares of its own stock which it has pledged to secure a loan. Vail v. Hamilton, 20 Hun (N.Y.) 355.

When stock is transferred to the name of the pledgee upon the company's books, the pledgee thus holding the legal title is entitled to exercise the privilege of voting unless it is otherwise provided by statute or by some by-law of the corporation. A statute which provides that when a pledgor of stock as collateral reserves the right to vote upon it, his vote shall be received, does not affect the right of a pledgee holding the legal title to stock without any reservation to the pledgor, to vote upon it, if he would be entitled to vote at common law, or under the corporate by-laws of the corporation.[1] "It is a right of property incident to the legal title to the stock, and the declaratory and directory provisions of the statute did not take it away."

The pledgor of stock has the right to vote upon it in case the pledgee does not claim the right to vote upon it under an agreement with the pledgor.[2]

§ 442. **One in whose name stock is registered upon the books of the corporation has the prima facie right to vote** upon it, though, in fact, he may hold the stock as pledgee or trustee for a pledgee.[3] But if his only title is that of pledgee, and that title is the full measure of his rights and authority as regards the stock, the pledgor is entitled, upon proof of his general ownership, to vote upon the stock, though he has pledged it for its full value.[4] A trustee holding the stock for the pledgee has no greater rights. The trustee in such case is merely an agent of the creditor, and the delivery or transfer of the stock to him amounts to the same as a delivery of it to the creditor.

Stock belonging to the corporation itself, though transferred to a trustee to hold in pledge for a creditor, can not be voted upon by any person.[5] It can not be voted upon by the cor-

[1] Commonwealth v. Eberhardt (Pa.), 25 Atl. Rep. 535, per Mitchell, J.

[2] Dulin v. Pacific Wood & Coal Co., 103 Cal. 357, 35 Pac. Rep. 1045, 37 Pac. Rep. 207.

[3] *In re* Barker, 6 Wend. (N. Y.) 509; *In re* Mohawk & Hudson R. R. Co., 19 Wend. (N. Y.) 135.

[4] Brewster v. Hartley, 37 Cal. 15.

[5] Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

poration in which the general property remains, or by any one in its behalf, and it can not be voted upon by the trustee in behalf of the pledgee.

§ 443. **But it does not follow that a pledgee or his trustee will be restrained by injunction from voting** upon the stock standing upon the books of the company in his name without intimation that he is not the absolute owner of it. In a recent case in New York a pledgor of certain shares of the stock of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, which had been transferred to a trustee for the pledgee, obtained a temporary injunction against the trustee's voting upon the stock. The plaintiff's complaint alleged that the trustee, who was the president of the New York, Lake Erie and Western Railway Company, by reason of his control of the pledged shares, had been enabled to control the management of the former corporation, and had managed the same without regard to its best interests, and so as to subserve the interests of the corporation of which he was president; that the trustee had voted on these shares at previous elections held by the stockholders, and claimed the right to do so at future elections; that it was greatly against the pledgor's interest to permit the trustee so to vote, and that the pledgor would suffer great and irreparable injury if the trustee should be permitted to do so. The court of appeals, however, reversed the action of the supreme court, and held that the temporary injunction was unauthorized.[1] Chief Justice Andrews, delivering the opinion of the court, said: "It is not sufficient to authorize the remedy by injunction, that a violation of a naked legal right of property is threatened. There must be some special ground of jurisdiction; and where an injunction is the final relief sought, facts which entitle the plaintiff to this remedy must be averred in the complaint, and established on the hearing. The complaint in this case is bare of any facts authorizing final relief by injunction. It is true that it is alleged that

[1] McHenry v. Jewett, 90 N. Y. 58, 62, reversing 26 Hun 453.

the defendant, by the use of the shares, has been enabled, to a great extent, to control the management of the corporation in the interest of the New York, Lake Erie and Great Western Railway Company, with little or no regard to the best interests of the company issuing the shares. But there are no facts supporting this allegation, nor is it averred that the interests of the latter company have been prejudiced, or that the value of the shares has been impaired by the acts of the defendant. So also it is alleged that it is greatly against the plaintiff's interest as a shareholder to permit the defendant to vote upon the shares, and that the plaintiff will suffer great and irreparable injury if the defendant is permitted to do so. But no facts justifying these conclusions are stated; and the mere allegation of serious or irreparable injury, apprehended or threatened, not supported by facts or circumstances tending to justify it, is clearly insufficient. Neither injury to the plaintiff's property, inadequacy of legal remedy, or any pressing or serious emergency, or danger of loss, or other special ground of jurisdiction, is shown by the complaint. The complaint, therefore, does not show that the plaintiff is entitled to final relief by injunction."

§ 444. **A creditor voting upon stock held in pledge does not thereby convert it to his own use,** and make it his own.[1]

A person holding stock of a corporation merely as collateral security, without participating in its meetings, is not so far a part of the corporation as to be chargeable with knowledge of facts in possession of the corporation or its officers.[2] Nor is he so far the owner of the stock as to be entitled to notice of the meetings of the corporation.[3] The pledgor is still the owner of the stock, and a member of the corporation.[4]

§ 445. **The statutes of several states exempt those who hold stock in a representative capacity, or by way of security, from**

[1] Heath v. Silverthorn Lead Mining & Smelting Co., 39 Wis. 146, 157.

[2] Baker v. Woolston, 27 Kan. 185.

[3] McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274.

[4] Merchants' Bank v. Cook, 4 Pick. (Mass.) 405.

the usual liabilities of stockholders. There is a manifest justice in such statutes which should lead to their adoption in every state. Corporate stocks now represent a large share of the capital or property of the country, and it is important, as a matter of commercial policy, that ready use of such capital in general business should be made as safe and convenient as possible. If a person taking stock merely as collateral security is to be made liable as a general stockholder, in place of the owner of the stock, he may well hesitate to incur liabilities he knows not of by becoming a stockholder, and may well decline to take such collateral unless he has a full knowledge of the affairs of the corporation. In a late case before the supreme court of the United States it was remarked that "the courts in England, and some in this country, have gone very far in sustaining a liability for unpaid subscriptions to stock against persons holding the same in any capacity whatever, whether as trustees, guardians or executors, or merely as collateral security. It can not be denied that, in some cases, the extreme length to which the doctrine has been pushed has operated very harshly; and in cases in which the corporation itself has no just right to enforce payment, and where no bad faith or fraudulent intent has intervened, it may be doubted whether creditors have any better right, unless by force of some express provision of a statute."[1]

§ 445a. **United States.**[2] The statute in regard to national banking associations provides that persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such funds would be if living and competent to act and hold the stock in his own name.

Although the statute does not exempt pledgees from personal liability, a pledgee who receives from his creditor, acting

[1] Burgess v. Seligman, 107 U. S. 20, 2 S. C. Rep. 10, 15, per Bradley, J.

[2] R. S., § 5152.

in good faith and for the sole purpose of securing the payment of a debt to the pledgee, certificates of stock in a national bank and surrenders the certificates and takes out new ones in his own name, in which he is described as pledgee, and holds them afterwards in good faith as such pledgee as security for the payment of a debt, is not a shareholder, subject to the personal liability imposed upon stockholders by the statute.[1]

§ 445b. **California.**[2] The liability of a stockholder extends to every guardian or other trustee who voluntarily invests any trust funds in the stock. Trust funds in the hands of a guardian or trustee shall not be liable under the provisions of this section by reason of any such investment, nor shall the person for whose benefit the investment is made be responsible in respect to the stock until he becomes competent and able to control the same, but the responsibility of the guardian or trustee making the investment shall continue until that period. Stock held as collateral security, or by a trustee, or in any

[1] Pauly v. State Loan & Trust Co., 165 U. S. 606, 622. Mr. Justice Harlan, delivering the opinion of the court, said: "It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment when the association becomes insolvent and goes into the hands of a receiver. But this is upon the ground that by allowing his name to appear upon the stock list as owner he represents that he is such owner, and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the person assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value. But this rule can have no just application when, as in this case, the creditors were informed by that list that the party to whom certificates were issued was not in fact, and did not assume to be, the owner of the shares represented by them, but was and assumed to be only a pledgee having no general property in the thing pledged, but only a right, upon default, to sell in satisfaction of the pledgor's obligation. Upon inspecting the stock registry of any list of shareholders or of transfers kept by the bank, creditors will know that they can not regard a pledgee as the actual owner."

[2] Civ. Code, § 322; Borland v. Nevada Bank, 99 Cal. 89, 33 Pac. Rep. 737.

other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor, or person or estate represented is to be deemed the stockholder as respects such liability.

§ 446. **Colorado.**[1] No person holding stock in any corporation as executor, administrator, conservator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such corporation, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estate and funds in the hands of such executor, administrator, conservator, guardian, or trustee shall be liable in like manner, and to the same extent, as the testator or intestate, or the ward or person interested in such trust funds would have been, if he had been living, and had been competent to act and held the stock in his own name.

§ 446a. **District of Columbia.**[2]—No person holding stock in such company as collateral security shall be personally subject to any liability as stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly.

§ 447. **Idaho.**[3]—Stock held as collateral security, or by a trustee, or in any representative capacity, does not make the holder thereof a stockholder, so as to charge him with the debts or liabilities of the corporation; but the pledgor, or person, or estate represented, is to be deemed the stockholder, as respects such liability.

§ 447a. **Illinois.**[4]—No person holding stock in a railroad

[1] 1 Mills' Annot. Stats. 1891, § 495.

[2] R. S. 1875, § 578; Comp. Stats. of D. C. 1889, c. 15, § 62.

[3] R. S. 1887, § 2609. But a trustee voluntarily investing trust funds in stock is, to a certain extent, liable as a stockholder.

[4] R. S. 1898, c. 32, § 23.

corporation as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholders of such corporation; but the person pledging the stock shall be considered as holding the same, and shall be liable as a stockholder accordingly.

§ 448. **In Indiana**[1] it is enacted that no person holding stock in any company, as executor, administrator, guardian, or trustee, or as collateral security, shall be personally subject to any liability as stockholder of such company, but the estate and funds in the hands of such executor, administrator, guardian, or trustee, shall be liable therefor, and the person pledging his stock as aforesaid shall be considered as holding the same.

Every such executor, administrator, guardian, or trustee, shall represent the share of stock in his hands, and vote as a stockholder, and every person who shall pledge his stock as aforesaid, may, nevertheless, represent the same at such meetings, and vote accordingly.

§ 449. **Maryland.**[2]—No person holding stock in such corporation as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such corporation; but the person pledging the stock shall be considered as holding the same, and shall be liable as stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian, or trustee, shall be liable in like manner, and to the same extent as the testator or intestate, or ward, or person interested in such trust fund, would have been if he had been living and competent to act, and held the same stock in his own name.

[1] Stats. 1876, p. 371, §§ 8, 9; Burns' R. S., §§ 3431, 3432.

[2] R. Code 1878, p. 323, § 61; 1 Pub. Gen. Laws, p. 302, § 66; Matthews v. Albert, 24 Md. 527.

§ 450. **Massachusetts.**[1]—In transfers of stock as collateral security the debt or duty which such transfer is intended to secure shall be substantially described in the deed or instrument of transfer. A certificate of stock issued to a pledgee or holder of such collateral security shall express on the face of it that the same is so holden; and the name of the pledgor shall be stated therein, who alone shall be responsible as a stockholder.

It is held that a person who takes a certificate of stock in a corporation as collateral security for a debt is subject to any liability for the debts of the corporation for which other stockholders are liable unless the certificate shows that the shares are so holden; and the burden is on him to show the form of the certificate.[2]

§ 451. **In Missouri**[3] no person holding stock in a railroad corporation as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such corporation; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly.

§ 451a. **New Mexico.**—No person holding stock as executor, guardian or trustee, or holding it as collateral security or in pledge, shall be personally subject to any liability as a stockholder of the company; but the person pledging the stock shall be considered as holding the same, and shall be liable as a stockholder accordingly.[4]

§ 452. **New York.**[5]—No person holding stock in any company, as executor, administrator, guardian, or trustee, and no

[1] P. S. 1882, c. 105, § 25.

[2] Barre Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563.

[3] 1 R. S. 1899, § 1041. For construction of this statute, see §§ 457, 458, and Fisher v. Seligman, 75 Mo. 13; Griswold v. Seligman, 72 Mo. 110. These decisions are overruled by the supreme court of the United States in Burgess v. Seligman, 107 U. S. 20, 27 Alb. L. J. 256, 2 S. C. Rep. 10.

[4] Comp. Laws 1884, § 206.

[5] 2 R. S. 1881, p. 1548, § 11; McMahon v. Macy, 51 N. Y. 155.

person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian, or trustee, shall be liable in like manner and to the same extent as the testator, or intestate, or the ward, or person interested in such trust fund would have been, if he had been living and competent to act, and held the same stock in his own name.

§ 452a. **North Dakota[1] and Oklahoma.[2]**—Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder so as to charge him with the debts or liabilities of the corporation, but the pledgor, or person or estate represented is to be deemed the stockholder as respects such liability.

§ 453. **Ohio.[3]**—The term "stockholders," as used in the statutes regarding personal liability, applies not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although this appears on the books in the name of another. But a pledgee of stock is not a stockholder having the liabilities of a stockholder.[4]

Thus, a pledgee who holds a power of attorney to transfer the stock, but has never obtained a transfer on the books of the company or exercised any acts of ownership as to the stock, has not incurred the liabilities of a stockholder.[5]

§ 454. **Washington.[6]**—No person holding stock as executor, administrator, guardian, or trustee, or holding it as collateral security, or in pledge, shall be personally subject to any liability as a stockholder of the company; but the person pledg-

[1] R. Code 1895, § 2902.

[2] R. S. 1893, c. 17, ¶ 963.

[3] Bates' Annot. R. S. 1898, § 3259; R. S. 1880, § 3259.

[4] Henkle v. Salem Manuf. Co., 39 Ohio St. 547.

[5] Henkle v. Salem Manuf. Co., 39 Ohio St. 547.

[6] 1 Codes & Stats. 1897, § 4268.

ing the stock shall be considered as holding the same, and shall be liable as a stockholder, and the estate and funds in the hands of the executor, administrator, guardian or trustee shall be liable in like manner and to the same extent as the testator, or intestate, or the ward or person interested in the trust fund would have been if he or she had been living and competent to act and hold the stock in his or her name.

§ 455. **Wisconsin.**[1]—No person holding stock in any railroad corporation as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such corporation, for any calls or installments on any past paid stock thereof; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates and funds in the hands of such executor, administrator, guardian, or trustee, shall be liable in like manner and to the same extent as the testator or intestate, ward or person interested would have been, if he had been living, or competent to act, and held the same stock in his own name.

§ 456. **Wyoming.**[2]—No person holding stock as collateral security shall be personally subject to any liability as stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly.

§ 457. **One to whom a corporation has pledged its own stock is entitled to the benefit of a statute which exempts a pledgee from liability as a stockholder,**[3] and continues the liability of the pledgor. This question has arisen under the statute of Missouri, and was decided by the supreme court of that state contrary to the proposition stated above.[4] One ground of the

[1] 1 G. S. 1898, § 1827.

[2] R. S. 1887, § 516; Compiled Laws 1876, c. 34, §§ 16, 17.

[3] Burgess v. Seligman, 107 U. S. 20, 27 Alb. L. J. 256, 2 S. C. Rep. 10, 24.

[4] Fisher v. Seligman, 75 Mo. 13; Griswold v. Seligman, 72 Mo. 110.

decision was that in case of such a pledge by the corporation itself of stock which has never been issued in the usual course of business, unless the pledgee becomes a stockholder with a stockholder's liabilities, there is no person who can be made liable as a stockholder; that in every case of a pledge within the meaning of the statute, there must be a stockholder whom the law still regards as a stockholder with a stockholder's responsibilities; that if there is not a pledgor who occupies the position of a stockholder, there must be a pledgee who is responsible as a stockholder; that there must be some one against whom a creditor can seek redress in case the corporation becomes insolvent. For these reasons the state court held that the statute was inapplicable in case of a pledge by a corporation of its unissued stocks.

Upon this part of the case Mr. Justice Bradley, delivering the opinion of the supreme court of the United States adversely to the judgment of the state court, said:[1] "The argument that the exemption from liability in cases of stock held as collateral security applies only to those who have received it from third persons who were stockholders, and who can be proceeded against as such, seems to us unsound, and contrary both to the words and the reason of the law. It takes for granted that stock can not be received as collateral security from the corporation itself, and still belong to the corporation, and yet we know that such transactions are very common in the business of the country. * * * The argument is that the words of the statute imply that there must always be some person or estate to respond for the stock, or else the exemption can not take effect. The obvious answer is that this clause fixes the liability upon the pledgor as a stockholder, where there is a pledgor who can be made liable in that character. When the corporation pledges its own stock as collateral security, though it can not be proceeded against as a stockholder *eo nomine*, the reason is because it is primarily liable, before all stockholders, for all its debts. In such a case the clause last quoted would not strictly

[1] Burgess v. Seligman, 107 U. S. 20, 27 Alb. L. J. 256, 2 S. C. Rep. 10, 24.

apply to it; but the holder of its stock as collateral security would be within both the letter and the spirit of the first clause. It is supposed that some flagrant injustice would ensue if there was not some one who could be reached as a stockholder in every case of stock pledged as collateral security; hence, stock pledged by the corporation itself must be regarded as belonging to the pledgee, though no other pledgee of stock is treated in this way. Where is the justice of this? Why should the stock be necessarily considered as belonging to some one besides the corporation itself? Is any one harmed by considering the corporation as its true owner? If the stock had not been issued as collateral security, it would not have been issued at all; it would not have been in existence. Would the creditors have been any better off in such case? They are better off by the issue of the stock as collateral, because the general assets of the company here received the benefit of the moneys obtained by means of the pledge. The more closely the matter is examined, the more unreasonable it seems to deny to a pledgee of the corporation the same exemption which is extended to the pledgee of third persons. We think that the one equally with the other is protected by the express words and true spirit of the law."

§ 458. **A pledgee of a corporation's own stock is entitled to a statutory exemption from liability, though he has voted upon the stock** without having special authority to do so.[1] It was adjudged otherwise by the supreme court of Missouri in a case where a person had taken from the corporation as security for advances a certificate for a majority of its capital stock absolute upon its face, and had voted upon it and controlled the election of the officers of the corporation. It was held that the pledgee by voting upon the stock without having any contract authority to do so was estopped to deny that he was a stockholder, and he was made liable as such both to the corporation and to its creditors. The stock having been pledged by a written contract containing no such authority, it was declared

[1] Burgess v. Seligman, 107 U. S. 20, 27 Alb. L. J. 256, 2 S. C. Rep. 10.

that it was not even competent for the pledgee to show that there was a verbal understanding that he should have the privilege of voting upon the stock.[1]

But the supreme court of the United States, upon the same facts, made a contrary decision, which must settle the law, not merely by reason of the authority of the court but also by virtue of the conclusiveness of its reasoning, which can be stated here only in part. Mr. Justice Bradley, speaking for the court, said: "If the law allows stock to be held in trust, or as collateral security, without personal liability, and if, as we suppose, the clear effect of the contract was to create such holding in this case, we do not see how the doctrine of estoppel can apply. The only parties to complain would be the other stockholders, who might, perhaps, complain that stock held merely in trust, or as collateral security, is not entitled to participate with them in the privilege of voting. But from them no complaint is heard. Creditors could not complain, for, on the hypothesis that stock may lawfully be held at all in trust, or as collateral security, without incurring liability to them, the act of voting on the stock can not injure or affect them. In the absence of such a law the case might be very different. Undoubtedly it has been held, in cases innumerable, that acting as a stockholder binds one as such; but that is where the law does not allow stock to be held at all without incurring all the liabilities incident to such holding. The present is an action at law based upon the supposed liability of the defendants under a statute which makes the distinction referred to,

[1] Griswold v. Seligman, 72 Mo. 110, 124. "This is a case where acts speak louder than words; where plausible theories go for nothing, when confronted by palpable facts. We can not impute to the pledgees either ignorance of, or a desire to violate the law, and so must conclude that they by the act of voting the stock represented themselves to the corporation, and were by the corporation regarded as fully entitled to the privileges they claimed and exercised. This being the case, they certainly can not be heard to gainsay their heretofore admitted title; to assert that title, if there was a profit, and deny it if there was a loss." Per Sherwood, C. J. Affirmed in Fisher v. Seligman, 75 Mo. 13.

Matthews v. Albert, 24 Md. 527, and McMahon v. Macy, 51 N. Y. 155, to the contrary, are distinguished in Griswold v. Seligman, 72 Mo. 110.

and which does not make all stockholders liable indiscriminately. * * * It is by no means clear, however, that the pledgee did not have a right to vote on the stock, even as against the stockholders. When the law provides that if a person holds stock as a trustee, or by way of collateral security only, he shall not be personally liable for the company's debts, it supposes that the stock shall be holden, and that the pledgee or trustee shall be the holder. If, then, the law is to have any force or effect, the mere fact of holding can not be set up as a bar or estoppel against proof of the manner and character of such holding. And if such pledgee or trustee may be a holder of the stock in that character, is he bound to be perfectly passive in his holding? He will not be entitled to any dividends or profits, it is true, or, if he receives dividends or profits, he must account therefor; but is it certain that he may not lawfully vote on the stock? An executor, administrator, guardian, or trustee certainly may vote; and where is the rule to be found that a holder for collateral security, under a law which permits such holding, may not vote on the stock so held without losing his character as a mere pledgee? But, as before said, if the pledgee in voting on the stock exceeds his right as such pledgee, it can not have the effect of making the stock his own. No one is injured, and no one can complain except the other stockholders whose rights are invaded."

§ 459. **This view is sustained by decisions in cases arising under other statutes** similar to that of Missouri. Thus it was so decided in Maryland, with reference to a statute of that state, from which the Missouri statute, so far as relates to the exception of those holding stock in trust or as collateral security, was copied. It was sought to charge one who had loaned money to the corporation and had taken from it a certificate of stock, as security for its payment, as a general stockholder, and liable for the company's debts. The certificate was originally issued to him in absolute form, but after its

issue, an indorsement was made on it by the president of the corporation, to the effect that it had been deposited with the holder as collateral security for a loan. It was held that the holder of the certificate was not personally subject to any liability as a stockholder, but was protected by the exemption in the statute.[1]

A similar decision was made in New York in a case arising upon a like statute. The certificate pledged in this case was one that had been regularly issued by the corporation in the usual course of business. It was an absolute transfer of the stock to the pledgee, but it was held that it might be shown by parol evidence that the transfer was in fact made to him as collateral security.[2]

The supreme court, referring to these decisions and approving them, said:[3] "We do not well see how any different conclusion could logically have been arrived at. If the law declares that stock held as collateral security shall not make the holder liable, surely it must be competent to show that it is so held. And when this fact is once established, there is an end of the application of estoppel, unless it can be invoked by some party who has been specially misled by the conduct of the defendants."

§ 460. **If one to whom stock has been pledged continues to hold it after the debt is paid** by a certificate in his own name, under an agreement made at the time of taking the stock that he would sell the stock if he could, and he does not return the stock to the former owner until the corporation has become insolvent, he is not exempt from liability to the creditors of the corporation as being a pledgee, or even as holding the

[1] Matthews v. Albert, 24 Md. 527.

[2] McMahon v. Macy, 51 N. Y. 155.

The commissioners of appeal said: "It is always competent to show that an assignment or conveyance absolute in form, was only intended as a security. There is nothing in any statute which makes the books of the company incontrovertible evidence of ownership of stock. A person may be the absolute legal and equitable owner of stock without any transfer appearing upon the books."

[3] Burgess v. Seligman, 107 U. S. 20, 2 S. C. Rep. 10, 27 Alb. L. J. 256.

stock as trustee, but as to such creditors he stands in the shoes of the former owner.[1]

II. *His Rights Acquired in Good Faith from the Apparent Owner.*

§ 461. **A certificate of stock in a corporation is not a negotiable instrument;** and a *bona fide* assignee of such a certificate, with a power to transfer the stock, takes it subject to the equities existing against the assignor,[2] whether in favor of the corporation or of a third person. Therefore, if a certificate of stock be fraudulently issued by the agent of a corporation, to one not entitled to the stock, and such holder assign it as collateral security for a loan of money, although the lender take the certificate in good faith, relying upon its genuineness, he

[1] Erskine v. Lowenstein, 11 Mo. App. 595.

[2] London & County Banking Co. v. London & River Plate Bank, 20 Q. B. D. 232; Shaw v. Railroad Co., 101 U. S. 557, 565; Bangor Electric Light & Power Co. v. Robinson, 52 Fed. Rep. 520; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107; O'Herron v. Gray, 168 Mass. 573, 47 N. E. Rep. 429; Knox v. Eden Musee American Co., 148 N. Y. 441, 42 N. E. Rep. 988; Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282; Sherwood v. Meadow Valley M. Co., 50 Cal. 412; Barstow v. Savage M. Co., 64 Cal. 388, 1 Pac. Rep. 349, disapproving of Winter v. Belmont M. Co., 53 Cal. 428.

In Mechanics' Bank v. N.Y. & N. H. R. Co., 13 N.Y. 599, 626, the subject was fully examined. This case arose out of a fraudulent overissue of stock of the defendant corporation by its agent Schuyler. Upon this point Comstock, J., said: "Stocks are not like bank bills, the immediate representative of money, and intended for circulation. The distinction between a bank bill and a share of bank stock it is not difficult to appreciate. Nor are they, like notes and bills of exchange, less adapted to circulation, but invented to supply the exigencies of commerce, and governed by the peculiar code of the commercial law. They are not like exchequer bills and government securities, which are made negotiable either for circulation or to find a market. Nor are they like corporation bonds, which are issued in negotiable form for sale, and as a means for raising money for corporate uses. The distinction between all these and corporate stocks is marked and striking. They are all in some form the representative of money, and may be satisfied by payment in money at a time specified. Certificates of stock are not securities for money in any sense, much less are they negotiable securities. They are simply the muniment and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member."

can not as the holder of a negotiable instrument claim the rights of a stockholder. But he is entitled to relief upon another ground. The certificate having been issued under the corporate seal with the signatures of the proper officers, acting within the scope of their apparent authority, the corporation is estopped from repudiating the instrument; and the holder having an equitable title may require the corporation to respond in damages, if it is unable to transfer the stock to him by reason of having already issued the full amount of its authorized shares.[1] A corporation not less than an individual is answerable for the conduct of its agents in the business intrusted to their care. The fact that the assignor of such certificate was cognizant of the fraud of the officers of the corporation in issuing it, or even participated in such fraud, is not conclusive against such *bona fide* holder. For though a certificate of stock is not a negotiable instrument, it is a written declaration that the holder has a share in the capital of the corporation, and if he has been misled by such declaration, the corporation that has made the statement, and not he who has parted with his money relying upon its truth, should bear the loss.[2]

§ 461a. **But if a person does not act in good faith or does not exercise due care in taking a certificate of stock,** and an

[1] *In re* Bahia & San Francisco R. Co., L. R. 3 Q. B. 584; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 231; Fatman v. Lobach, 1 Duer (N. Y.) 354; Leavitt v. Fisher, 4 Duer (N. Y.) 1; Hall v. Rose Hill & Evanston Road Co., 70 Ill. 673; Bank of Kentucky v. Schuylkill Bank, 1 Pars. (Pa.) 180; Willis v. Fry, 13 Phila. (Pa.) 33, 6 Weekly Notes of Cases 461; Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. Rep. 381; Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513. See National Exchange Bank v. Sibley, 71 Ga. 726, where it was not decided whether the corporation or its officers were liable.

[2] That certificates of stock in a corporation are not negotiable securities in a commercial sense, see Biddle v. Bayard, 13 Pa. St. 150, 152; Burton v. Peterson, 35 Leg. Int. 144. See, also, Atkins v. Gamble, 42 Cal. 86, 99, 10 Am. Rep. 282; Sherwood v. Meadow Valley Mining Co., 50 Cal. 412; Winter v. Belmont Mining Co., 53 Cal. 428, 432.

officer of the corporation fraudulently issues the certificate, no damages can be recovered from the corporation upon its failure to recognize the certificate as valid. Thus, if the treasurer of a corporation issues as security for his private debt a certificate of stock in the corporation, and the creditor taking the certificate fails to investigate the title to the stock, he is affected with notice of whatever he might have discovered upon making proper inquiry.[1] In the case cited the court say: "An agent can not properly act for his principal and himself when their interests are adverse, and any person dealing with an agent in a matter affecting his principal, and knowing that the interests of the agent are adverse to those of his principal, ought to be held to the duty of ascertaining that the acts of the agent are authorized by his principal. The difficulty in the present case is that these considerations are only partially applicable to it. It is on account of the danger that one officer may abuse his power to issue stock certificates that the by-laws of corporations usually require the certificates to be signed by at least two officers of the corporation. If one of these neglects his duty, or delegates the performance of it to the other, the safeguard intended by this requirement of the by-laws becomes ineffectual, and if one of these officers, in issuing a stock certificate, has a personal interest adverse to that of the corporation, a person dealing with him and knowing this may well be required to take notice that the rights of the corporation are not protected in the transaction to the full extent intended by the by-laws. * * * We think that it is a safer and more reasonable rule to hold that a person taking in pledge a certificate of stock, newly issued in his name by an officer of a corporation as security for the private debt of the officer, should be required to investigate the title to the stock, if the officer is one who has the power, either alone or with others, to issue stock certificates, than to hold that such a person can rely upon a certificate so issued to him in the absence of actual notice or knowledge that it has been fraudulently issued."[2]

[1] Farrington v. South Boston R. Co., 150 Mass. 406, 409, 410, 23 N. E. Rep. 109.

[2] See the case of Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 S. C. Rep. 345, affirming the decision of the circuit court, 15 Fed. Rep. 141.

The treasurer of a savings bank took certificates of stock belonging to the savings bank, had them transferred to a national bank, and new certificates issued to such bank, and, on the pledge of the new certificates, borrowed a sum of money in the name of the savings bank. The debt not being paid, the national bank sold the shares of stock under a power given by the treasurer of the savings bank in its name. It was held that, whether the treasurer of the savings bank had authority or not to make the transfers of the stock, the receivers of the savings bank could not maintain an action of contract against the national bank to recover the proceeds of the shares sold by it.[1]

§ 462. **A usage of brokers or bankers to treat a certificate of stock as a negotiable instrument** is bad, and can not be shown. Even a usage to issue powers of attorney for the transfer of stock, with the name of the transferee left blank, has been declared a vicious usage, which no considerations of convenience are sufficient to justify.[2] But the validity of such powers is well established.[3]

§ 463. **There are, however, some authorities which assimilate certificates of stock very closely to negotiable instruments,** and give a *bona fide* holder for value very much the same rights that such a holder of negotiable paper, taking it before maturity, has. Thus, in a recent case, the court of errors and appeals of New Jersey say: "By commercial usage, as universally acknowledged by the business community as the law of negotiable paper, and sanctioned by repeated adjudications in our courts, as well as in those of other states, a certificate of stock, accompanied by an irrevocable power of attorney, either filled up or in blank, is, in the hands of a third party, presumptive evidence of ownership in the holder. And where the

[1] Holden v. Metropolitan Nat. Bank, 138 Mass. 48.

[2] Denny v. Lyon, 38 Pa. St. 98, 80 Am. Dec. 463, per Woodward, J.; Aull v. Colket, 2 Weekly Notes Cas. 322.

[3] § 165.

party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title can not be impeached. The holder of the certificate may fill up the letter of attorney, execute the power, and thus obtain the legal title to the stock. And such a power is not limited to the person to whom it was first delivered, but inures to each *bona fide* holder into whose hands the certificate and power may pass. Under these well-recognized principles large amounts of property daily pass from hand to hand; are sold and resold, or hypothecated for loans without an actual transfer on the books of the corporation, and without other evidence of ownership than the possession by the holder of the certificate and power of attorney.'"[1]

Public securities and ordinary money bonds of corporations, payable to bearer, have all the ordinary characteristics of negotiable paper, and, therefore, are not subject, in the hands of a holder for value and in good faith before maturity, to equities existing against any prior holder.[2]

§ 464. **Certificates of stock not being negotiable instruments, the title to them is not changed by an involuntary transfer** by the owner, as in the case of loss or theft, or the putting of them into circulation through forgery or fraud.[3] When a negotiable instrument is lost or stolen, or put into circulation without the knowledge or consent of the owner, a *bona fide* purchaser for value, without notice, acquires a valid title to it. But title to a certificate of stock can be acquired only through

[1] Prall v. Tilt, 28 N. J. Eq. 479, per Green, J., 27 N. J. Eq. 393; and see Mount Holly Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Broadway Bank v. McElrath, 13 N. J. Eq. 24; Leavitt v. Fisher, 4 Duer (N. Y.) 1.

[2] Jones on Railroad Securities, §§ 197-210; Morris Canal & Banking Co. v. Lewis, 12 N. J. Eq. 323; Morris Canal & Banking Co. v. Fisher, 9 N. J. Eq. 667.

[3] Davis v. Bank of England, 2 Bing. 393; Pratt v. Taunton Copper Manuf. Co., 123 Mass. 110, 25 Am. Rep. 37; Machinists' Nat. Bank v. Field, 126 Mass. 345; Shaw v. Spencer, 100 Mass. 382, 1 Am. Rep. 115; Bercich v. Marye, 9 Nev. 312; Aull v. Colket, 2 Weekly Notes Cas. 322; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 5 So. Rep. 317; Merchants' Bank v. New York & N. H. R. Co., 13 N. Y. 599; Barstow v. Savage Mining Co., 64 Cal. 388, 1 Pac. Rep. 349, 49 Am. Rep. 705.

the voluntary act of the person entitled to dispose of the property. A certificate of stock indorsed in blank by the owner is in a condition to be passed from hand to hand, like any personal chattel. But if it was stolen from the owner, or lost by him, neither the thief nor the finder can convey any title by a transfer of it to an innocent purchaser for value; though, if the corporation issues a new certificate, a purchaser or pledgee of that acquires a good title as against the corporation.[1]

Thus, where the owner of shares in a railway company instructed a broker to sell certain shares, and the broker obtained from him transfers, in which blanks were left for the name of the purchaser and for the number of shares to be transferred, and the blanks were fraudulently filled up by the broker with shares not intended to be transferred, the certificates having been fraudulently obtained by the broker, and the shares sold to *bona fide* purchasers, it was held that the transfer of these shares was void, and that the original owner was entitled to have the shares delivered up, and their registration in the name of the purchaser rescinded.[2]

Again, an owner of shares in two companies, wishing to sell those in one company, was induced by his broker to execute a blank transfer, which the broker fraudulently filled with the numbers and descriptions of the shares in the other company, which the owner did not intend to transfer; and the broker having forged the attestations of the transfers, and stolen the certificates of the latter shares from a box deposited in a bank for safe keeping, pledged them for his own benefit. It was held in the exchequer chamber that the transfer was void, and that there was no such negligence on the part of the owner as estopped him from insisting that the property in the shares did not pass under the transfer.[3]

[1] See § 466.

[2] Tayler v. Great Indian Peninsular R. Co., 4 De G. & J. 559, 28 L. J. N. S. Ch. 285.

[3] Swan v. North British Australasian Co., 2 Hurl. & Colt. 175, on appeal from court of exchequer, 7 H. & N. 603, where the court was equally divided; the case first having been before the court of common pleas, 7 C. B. N. S. 400, where, also, that court was equally divided.

§ 465. **Whether it is negligence in the owner of shares to execute a transfer in blank** as to the transferee, and the description of the shares such that he is estopped from disputing the genuineness of the transfer, is a question that has been much discussed. The best and most authoritative statement of the law upon this subject is by Chief Justice Cockburn, in the exchequer chamber.[1] "I am of opinion," he said, "that negligence alone, although it may have afforded an opportunity for the perpetration of a forgery, by means of which another party has been damnified, is not of itself a ground of estoppel. The rule relating to negotiable instruments stands on peculiar grounds. The law relating to these instruments is part of the law merchant, which, in order that the negotiability of such instruments, which is of the very essence of their commercial utility, shall not be impaired, establishes that if a man once puts his name to such an instrument he shall be liable to a *bona fide* owner without notice, in respect of what may be added to give effect or negotiability to the instrument, notwithstanding this may be done in the absence of authority, or even for the purpose of fraud." But the doctrine of estoppel by which a genuine signature will make good a negotiable instrument fraudulenly written above it, can not be applied to make good other instruments executed in blank, and used for a purpose other than that intended by the maker. Moreover, negligence, to operate as an estoppel in any case, must be the proximate cause of the loss.

The negligence of a guardian in leaving his ward's certificate of stock, indorsed by the guardian in blank, for safe keeping in a bank, from which the cashier abstracted it and pledged it for his own debt, does not estop the ward from reclaiming his certificate from the person to whom it was pledged.[2]

§ 466. **One taking, in good faith, a certificate of stock from the apparent owner** may acquire title as against the true owner,

[1] Swan v. North British Australasian Co., 2 Hurl. & Colt. 175; and see Denny v. Lyon, 38 Pa. St. 98, 80 Am. Dec. 463; Biddle v. Bayard, 13 Pa. St. 150; Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80.

[2] O'Herron v. Gray, 168 Mass. 573, 47 N. E. Rep. 429.

although the certificate is not in any true sense a negotiable instrument, and does not even partake of the character of such an instrument. The rights of a *bona fide* holder in such case rest upon another principle; namely, that one who has conferred upon another by a written transfer all the *indicia* of ownership of property is estopped to assert title to it as against a third person who has in good faith purchased it for value from the apparent owner.[1] This forms an exception to the

[1] Pickering v. Busk, 15 East 38, 43; Rumball v. Metropolitan Bank, 2 Q. B. D. 194; Moore v. Miller, 6 Lans. (N. Y.) 396; Moore v. Metropolitan Nat. Bank, 55 N. Y. 41; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Wood's Appeal, 92 Pa. St. 379; Burton's Appeal, 93 Pa. St. 214; Moodie v. Seventh Nat. Bank, 33 Leg. Int. 400; State Bank v. Cox, 11 Rich. Eq. (S. C.) 344; Fraser v. Charleston, 11 S. C. 486; Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80; Strange v. H. & T. C. R. Co., 53 Tex. 162; Otis v. Gardner, 105 Ill. 436, 15 Rep. 332; Dovey's Appeal, 97 Pa. St. 153; West Branch & Susquehanna Canal Co.'s Appeal, 81* Pa. St. 19; Gass v. Hampton, 16 Nev. 185; Stone v. Marye, 14 Nev. 362; Walker v. Detroit Transit R. Co., 47 Mich. 338, 11 N. W. Rep. 187; Mandlebaum v. N. A. Min. Co., 4 Mich. 465; Nelson v. Owen, 113 Ala. 372, 21 So. Rep. 75; Winter v. Montgomery Gas-Light Co., 89 Ala. 544, 7 So. Rep. 773; Arnold v. Johnson, 66 Cal. 402, 5 Pac. Rep. 796; Ambrose v. Evans, 66 Cal. 74, 4 Pac. Rep. 960; Nutting v. Thomason, 46 Ga. 34; Farmers' & Mechanics' Bank v. Wayman, 5 Gill 336; Anderson v. Waco State Bank, 92 Tex. 506, 49 S. W. Rep. 1030.

In Wood's Appeal, 92 Pa. St. 379, 390, Trunkey, J., delivering the opinion of the court, said: "The rights of a *bona fide* holder, as against the true owner of the stock to whom the apparent owner of the stock has either sold or pledged, do not depend on a negotiable character in the certificates, but rest on another principle; 'namely, that one who has conferred upon another by a written transfer all the *indicia* of ownership of property, is estopped to assert title to it as against a third person who has in good faith purchased it for value from the apparent owner.' As a general rule, the vendor or pledgor can convey no greater right or title than he has. Simply intrusting the possession of a chattel to another as a depositary, pledgee, or other bailee, is insufficient to prevent the real owner reclaiming his property in case of an unauthorized disposition of it by the person as intrusted. The mere possession of chattels without evidence of property or authority to sell from the owner, will not enable the possessor to give good title. But if the owner intrusts to another the possession of property, and also written evidence of title and power of disposition over it, as respects innocent third persons, he is deemed as intending it shall be disposed of at the pleasure of the depositary. If there be conditions on which this apparent right of control is to be exercised, not expressed on the face of the instrument, the case, in principle, is like that of an agent who receives secret instructions qualifying or restricting an apparent absolute

rule that a purchaser of personal property other than negotiable commercial paper obtains no better title than his vendor had. This estoppel applies whenever the real owner of property has vested another with the apparent absolute title to it, by an instrument in writing, upon the faith of which a third person has dealt, whether the property be a specific chattel or a chose in action. It is of frequent application to cases of pledges of stock. "The rightful owner may be estopped by his own acts from asserting his title, as he may be in respect to other property of a like character. If he has invested another with the usual evidence of title or an apparent authority to dispose of it, he will not be allowed to make claim against an innocent purchaser dealing upon the faith of such apparent ownership, and *jus disponendi.*'"[1]

A pledge of a certificate of stock issued in the name of the pledgor and showing him to be the owner, entitles the pledgee to hold it as against the wife of the pledgor, whose separate means were used to purchase the stock and who had not known of or consented to its issuance in the husband's name or to the pledge by him for his own debt.[2]

power. If the owner of the stock voluntarily give certificates with blank assignment and power to make transfers to his brokers, who betray the confidence reposed in them, such owner must suffer the loss rather than innocent strangers whose money the brokers were thereby enabled to obtain. The principle applies to pledges of stock, and one who purchases from the pledgee may hold against the pledgor. And if the pledgee pledge it to secure payment of his own debt, the second pledgee may hold it as security till his debt be paid. 'A person loaning money on such certificate and power, has a right to believe that the borrower from whom he receives them has an absolute right to pledge the stock.' By commercial usage a certificate of stock, accompanied by an irrevocable power of attorney, either filled up or in blank, is, in the hands of a third party, presumptive evidence of ownership in the holder. And where the party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title can not be impeached."

[1] Weaver v. Barden, 49 N. Y. 286, 288, per Allen, J.

[2] Anderson v. Waco State Bank, 92 Tex. 506, 49 S. W. Rep. 1030, citing Winter v. Montgomery Gas-Light Co., 89 Ala. 544, 7 So. Rep. 773; Machinists' Nat. Bank v. Field, 126 Mass. 345; Pratt v. Taunton Copper Co., 123 Mass. 110; Mandlebaum v. N. A. Min. Co., 4 Mich. 465; Hill v. Moore, 62 Tex. 610; Edwards v. Brown, 68 Tex. 329, 4 S. W. Rep. 380, 5 S. W. Rep. 87.

If a shareholder in a corporation delivers as collateral security his certificate of shares, with a blank assignment and power executed by him, he passes to the pledgor all the external *indicia* of title to the stock, with a power of disposition over it apparently unlimited. One purchasing such shares in good faith from the pledgee may hold them against the pledgor; and if the pledgee himself pledges such shares as collateral security for a debt of his own, the second pledgee is entitled to hold them as security for the full amount of the debt for which they were pledged to him.[1] If, for instance, an owner of stock allow certificates to be taken in the name of his broker, who is carrying the stock upon a margin, without anything on the face of the certificates to show his ownership, the holder of the certificate can sell or pledge the stock as his own, and give a title which the owner can not interfere with.[2] And so, if an owner of shares, having transferred them in pledge by his indorsement, furnishes funds to another to pay the debt and take up the certificates, and after this has been done allows the certificates to remain thus indorsed in the hands of his agent, who afterwards pledges them for his own debt to a person who makes advances thereon in good faith, the latter can hold them against the true owner.[3] A person loaning money

[1] McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; and see Bank v. Lanier, 11 Wall. 369; Lowry v. Bank of Baltimore, Taney 310; Prall v. Tilt, 27 N. J. Eq. 393, 28 N. J. Eq. 479; Holbrook v. N. J. Zinc Co., 57 N. Y. 616; Willis v. Phila. & Darby R. Co., 6 Weekly Notes Cas. 461; Mount Holly Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Moodie v. Seventh Nat. Bank, 33 Leg. Int. 400; Stone v. Marye, 14 Nev. 362, 9 Rep. 448; Gass v. Hampton, 16 Nev. 185; Bridgeport Bank v. N. Y. & N. H. R. Co., 30 Conn. 231; Cushman v. Thayer Mfg. Co., 76 N. Y. 365, 32 Am. Rep. 315; Cherry v. Frost, 7 Lea (Tenn.) 1; Brewster v. Sime, 42 Cal. 139; and see Cowdrey v. Vandenburgh, 101 U. S. 572, 575.

[2] Thompson v. Toland, 48 Cal. 99.

[3] Jarvis v. Rogers, 13 Mass. 105, 15 Mass. 389. Parker, C. J., in the earlier decision, said: "If Russell (the agent) abused his trust by pledging the certificates instead of holding them in trust for Jarvis (the owner) this is an affair to be settled between the representatives of those parties. The certificates being lawfully in the hands of Russell, with the name of Jarvis on the back, without any restriction of the use of that name, and there being a vote of the company in which Jarvis concurred, that they should be transferable in that man-

upon such a certificate and power has the right to believe that the borrower from whom he receives them has an absolute right to pledge the stock.[1] In like manner, if an owner of stock loans his certificate, accompanied with a blank power of attorney to transfer the same with a broker or other bailee, and the latter pledges it for his own debt to one who has no knowledge of the fraud of the broker, the owner is estopped from setting up his own title as against the advances made by the pledgee.[2]

It has been insisted that to apply the foregoing rule to non-negotiable choses in action in effect makes them negotiable. "Not at all. No one pretends but that the purchaser will take the former, subject to all defenses, valid as to the original parties, nor that the mere possession is any more evidence of title in the possessor than is that of a horse. In both respects, the difference between these and negotiable instruments is vital, and not at all affected by the application of the same rule as to chattels."[3]

§ 466a. **Where a certificate of stock with a forged transfer or power of attorney was placed in the hands of an auctioneer for sale,** to whom the corporation issued a new certificate in his name, and he transferred it in good faith to a purchaser, to whom in turn the corporation issued a new certificate, on a bill in equity by the owner, whose transfer was forged, against the corporation and the purchaser of the shares, a decree was entered compelling the corporation to issue a new certificate

ner, it is enough for the defendant that he received them as collateral security for a debt, and that the debt has not been discharged."

And see Savage v. Smythe, 48 Ga. 562; Dovey's Appeal, 97 Pa. St. 153.

[1] Fatman v. Lobach, 1 Duer (N. Y.) 354; Leavitt v. Fisher, 4 Duer (N. Y.) 1.

[2] Burton's Appeal, 93 Pa. St. 214; Moodie v. Seventh Nat. Bank, 3 Weekly Notes Cas. 118; Aull v Colket, 2 Weekly Notes Cas. 322; Zulick v. Markham, 6 Daly (N. Y.) 129; Dickinson v. Dudley, 17 Hun (N Y.) 569; Strange v. H. & T. C. R. Co., 53 Tex. 162; Cherry v. Frost, 7 Lea (Tenn.) 1; Gass v. Hampton, 16 Nev. 185; Walker v. Detroit Transit R. Co., 47 Mich. 338, 11 N. W. Rep. 187.

[3] Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 48, 14 Am. Rep. 173, per Grover, J.

to such owner, but the bill was dismissed as against the purchaser, whose rights were declared to depend upon the certificate issued to him.[1] In a later case arising upon the same facts, the corporation having brought a bill in equitv against the auctioneer and the purchaser, praying that the former be ordered to pay to the bank the sum received from the purchaser, and that the purchaser be ordered to surrender the certificate, it was held that the bill could not be maintained.[2]

§ 467. **This rule is undoubtedly a sound one,** and forms the basis upon which the rights of pledgees of certificates of stock in cases such as have been given above must rest. It is true that in many of the cases the maxim applies, that a loss, as between two innocent parties, resulting from the fraud of a third person, should be cast upon the party who by employing and trusting such person enabled him to commit it.[3] But this may generally be regarded as a secondary and additional rule of law, by which, in such case, a *bona fide* pledgee of stock may sustain his title. There are many cases of betrayal of trusts by agents to which both of these rules are applicable. "The principle upon which these transactions have been and ought to be established, is this: that when the owner of stock, in the ordinary course of business and in the method common to all mercantile communities, by his own act has armed another,

[1] Pratt v. Taunton Copper Co., 123 Mass. 110, 25 Am. Rep. 37.

[2] Machinists' Nat. Bank v. Field, 126 Mass. 345.

[3] Fatman v. Lobach, 1 Duer (N. Y.) 554, per Oakley, C. J.; White v. Springfield Bank, 3 Sandf. (N. Y.) 222, 229; Pennsylvania Railroad Co.'s Appeal, 86 Pa. St. 80, 5 Weekly Notes Cas. 22. In this case the owner of stock had intrusted the certificates, accompanied by powers of attorney to sell and transfer the same, to an agent for safe keeping, and the agent fraudulently pledged them for a loan for his own use. Although the power of attorney was dated thirteen years before the transfer upon the books of the company was obtained by the pledgee of the stock, it was held that the corporation was justified in making the transfer, without inquiry as to the validity of the power. Judge Sharswood, delivering the opinion, said: "When one of the two parties who are equally innocent of actual fraud must lose, it is the suggestion of common sense as well as equity that the one whose misplaced confidence in an agent or attorney has been the cause of the loss, shall not throw it on the other."

his agent or attorney, with power to act for him, and when this agent or attorney deals with innocent third parties, who, without notice or other intervening equity, advance money upon the faith of the evidences of title in the possession of the attorney or agent, the owner takes every risk, and is bound by the act of the person whom he sees fit to hold out to the world as his attorney or agent.[1]

It is to be observed that in the cases to which the principle of apparent ownership has been applied, the apparent owner was, in his dealings with persons relying in good faith upon the appearances, the real owner, and sold or pledged the stock, or dealt with it as the real owner. Such cases are to be carefully distinguished from a case in which a person deals with an agent of the owner of stock with limited authority, knowing him to be only an agent, and not the real owner, and knowing, or having reason to know, that his authority is limited. Thus, an owner of stock delivered it, without indorsement or power to transfer, as security for a loan of $3,000. Afterwards the lender applied to a bank for a loan of $8,000 upon the certificate, stating that he wanted it for a client, and the agent of the bank agreed to make the loan upon receiving a power of attorney attached to the certificate. The lender thereupon, by representing to the owner that he ought to have a transfer, induced him to sign a printed blank transfer and irrevocable power of attorney, and obtained the money thereon from the bank; and subsequently he obtained from the bank a further loan upon the stock for his client, as he represented. He had, in fact, no authority from the owner to pledge the stock. It was held that, inasmuch as the holder of the certificate did not claim to be the owner of the stock, but only an agent of the owner, and there was nothing in the case to show that he was clothed with apparent authority to make the loan, beyond his own assertion, the owner was not estopped from

[1] Burton v. Peterson, 35 Leg. Int. 144, per Ludlow, J.; and see, also, Persch v. Quiggle, 57 Pa. St. 247; Moodie v. Seventh Nat. Bank, 3 Weekly Notes Cas. 118, 33 Leg. Int. 400; Jarvis v. Rogers, 13 Mass. 105, 15 Mass. 389, 393.

asserting his title to the stock, subject, perhaps, to a lien for the original loan of $3,000; that while the transfer or power might have given the holder an apparent ownership of the stock in case he had claimed to be the real owner, or it might have given him authority to go into the market as the agent of the owner, and as such to sell the stock and give good title, it did not hold him out as authorized to make a loan and pledge the stock; or, at most, it only held him out as authorized to pledge the stock for an authorized loan.[1]

§ 467a. **This rule as applied to an assignment of a life insurance policy** was much discussed, but not adopted in a recent case in Minnesota. A life insurance company issued a policy payable to the insured in twenty years. Subsequently the insured assigned the policy by a written assignment absolute in form, but in fact, merely as security or indemnity for a loan which the assignee agreed to procure for the insured but which he failed to do. The insured, however, remained in the possession of the policy, and subsequently assigned it to a bank as security for a loan, which he has never repaid. The bank made the loan relying on the absolute assignment from the assignee to the insured, and believing, from an examination of it, that the insured was the owner of the policy, and without any knowledge that the insured had any claim to it, or of any equities between him and the assignee. When the policy matured, the defendant paid it to the bank but with notice of the insured's claim. From the time the policy was assigned to the assignee until it matured, the assignee paid the premiums on it, which the insured has never repaid. It was finally held after two rearguments that the policy was assignable by the insured and by the first assignee to the bank, but that the assignment to the bank would be subject to the equities of the insured, in the absence of facts creating an equitable estoppel against him; and the mere fact that the assignment from the insured to his assignee was absolute in

[1] Merchants' Bank v. Livingston, 74 N. Y. 223, 7 N. Y. Weekly Dig. 249.

form, would not create such an estoppel. "But the laches of the insured and his practical abandonment of the policy by neglecting for eleven years to take active measures to recover possession of it, or to keep it alive by paying the premiums on it, but allowing it to lapse unless the assignee saw fit to pay the premiums at his own expense, would estop him from now claiming any rights under or benefits from the policy, as against the assignee or the bank."[1]

§ 468. **The rule is the same whether the delivery of a certificate with a power of transfer be regarded as passing the legal title or merely an equitable one.** If it passes the legal title, then the owner having clothed his pledgee with the whole title, and consequently an unlimited power of disposition, can not set up an unknown equity against a title acquired by a subsequent assignee in good faith for a valuable consideration, and in the due course of trade. If such a transfer passes only an equitable title, still the owner having intrusted his pledgee not only with the possession of the certificate of stock, but also with written evidence over his own signature of title thereto, and of unconditional power of disposition over it, he is estopped to dispute the title which he has apparently conferred, and set up a prior equity in himself.[2]

§ 469. **Precedent debt.**—But to entitle a purchaser to protection against the legal title or a prior equity upon the ground that he has dealt with the person having the apparent ownership or right of disposition, he must appear to be a purchaser for value. What constitutes a valuable consideration is generally a question that is easily answered; for it is everywhere agreed that a payment of purchase-money or any part of it, or the parting with something of value upon the faith of the purchase, or a loan made at the time, or an agreement to extend the time of payment of an existing debt constitutes a valuable

[1] Brown v. Equitable Life Assurance Soc., 75 Minn. 412, 427, 78 N. W. Rep. 103, 671, 79 N. W. Rep. 968.

[2] Cherry v. Frost, 7 Lea (Tenn.) 1, 10, per Cooper, J.

consideration.[1] It is also the prevailing rule that a transfer of property in payment or security of a pre-existing debt is a sufficient consideration. But formerly in New York the rule was adopted as to negotiable paper, that a person taking it in payment or as security for an antecedent debt without giving further credit, surrendering any security or incurring any further obligation, is not a *bona fide* holder for value, as against third persons having prior equities;[2] and the same rule is also, for stronger reasons, applied to transfers of stock; and it is accordingly held that the mere existence of a precedent debt will not support a transfer of stock as against the rightful owner, or as against the equities of others, although the assignor be clothed with the apparent ownership or right of disposition.[3] If the stock be transferred partly in consideration of a precedent debt and partly for a new consideration paid at the time, the taker will be regarded as a holder for value so far as the assignment was made for a consideration paid at the time, but not a holder for value for the amount of the precedent debt.[4]

§ 470. **Collaterals taken in exchange for other collaterals are taken for value** to the extent of the consideration given in exchange. This is the rule where collaterals for a pre-existing debt are not regarded as taken for value. When old collaterals are surrendered and others taken in their place, the creditor in fact pays a consideration for the new securities, and the extent of that consideration is the value of the securities surrendered.[5]

§ 471. **Under the old usury laws,** which happily have now mostly disappeared, a person who took a pledge upon a usurious contract was not considered as a *bona fide* holder, in the

[1] Cherry v. Frost, 7 Lea (Tenn.) 1, 21 Am. Law Reg. (N. S.) 57.

[2] §§ 115–117.

[3] Weaver v. Barden, 49 N. Y. 286; Ashton's Appeal, 73 Pa. St. 153, 162; Moodie v. Seventh Nat. Bank, 33 Leg. Int. 400; Dovey's Appeal, 97 Pa. St. 153.

[4] Weaver v. Barden, 49 N. Y. 286; Gould v. Farmers' Loan & Trust Co., 23 Hun (N. Y.) 322.

[5] Cherry v. Frost, 7 Lea (Tenn.) 1, 21 Am. L. Reg. (N. S.) 57.

usual course of business.[1] "A note or stock taken to secure a loan of money which is illegal and forbidden at law, is not taken in the ordinary course of business, and such a transaction does not give the holder a superior right to that of a real owner who has been defrauded of his property by the person who passed it away on the usurious contract."[2] Therefore, if a re-hypothecation of stock be made under a contract void for usury, the pledgee will not be considered a *bona fide* purchaser without notice, and he will not therefore be protected in the possession of the stock as against the owner, who is entitled to recover it without even paying the original debt secured.[3]

§ 472. **Actual notice.**—When, however, one dealing with the apparent owner of stock has notice, actual or constructive, of the rights of the true owner, he can acquire no better title than the apparent owner can lawfully transfer.[4] A judgment creditor buying at an execution sale stock already transferred by the debtor by indorsement and delivery of the certificate, without any transfer on the books of the company, but with notice of such unrecorded transfer, obtains no better title than his debtor had.[5]

Thus, if the owner of corporate stock indorses upon the certificate an absolute power to transfer and delivers it to his broker as collateral security to protect the broker in carrying other stock, and the broker re-hypothecates the stock to a bank which has full knowledge of the ownership of the stock, and of the broker's want of authority to re-pledge it, the bank can not retain it as against the owner.[6]

It would seem to be upon this ground that where the owner

[1] Ramsdell v. Morgan, 16 Wend. (N. Y.) 574; Dean v. Howell, Hill & Den. (N. Y.) 39; Sands v. Church, 6 N. Y. 347.

[2] Felt v. Heye, 23 How. Pr. (N. Y.) 359, per Ingraham, C. J.

[3] Felt v. Heye, 23 How. Pr. (N. Y.) 359.

[4] Porter v. Parks, 49 N. Y. 564.

[5] Newberry v. Detroit & Lake Superior Iron Co., 17 Mich. 141.

[6] Westinghouse v. German Nat. Bank, 188 Pa. St. 630, 41 Atl. Rep. 734.

of stock executed and delivered to an agent a power of attorney in blank, with the understanding that it should be used to secure a particular creditor, whose name the agent inserted in the power, but erased after that creditor had been satisfied, and inserted another name, it was held that the agent's authority was exhausted by the first transaction, and the principal was entitled to a return of the stock.[1] It was contended on the one hand that the issuing of the power in blank implied the intention of the owner to pledge the stock to any creditor who should loan money to the attorney authorized to make the transfer; on the other, that the filling up of the blank in the first instance argued that any subsequent transferee knew that the owner had issued the power only for the benefit of the person whose name was first inserted in the power. Then the creditor replied that erasing the first name and inserting his own made the transfer under the power legal and valid; and the owner rejoined that the attorney's power was exhausted when he first filled the blank. "And out of this forensic game of shuttlecock and battledore," say the court, "we are expected to educe the equities that shall determine the title to the stock;" and they accordingly hold that the owner having proved his allegation that he transferred the stock only to secure the creditor whose name was first inserted, and that this creditor having been fully paid, he was entitled to a return of the stock.

§ 473. **The mere fact that a certificate of stock re-hypothecated by the pledgee, was in the name of the first pledgor,** accompanied with his power of attorney to transfer it, **is not of** itself sufficient to charge the second pledgee with notice of the first pledgor's rights, or even to charge him with sufficient knowledge of those rights to put him upon inquiry.[2] To pass

[1] Denny v. Lyon, 38 Pa. St. 98, 80 Am. Dec. 463; and see Sitgreaves v. Farmers' & Mechanics' Bank, 49 Pa. St. 359, 365; May v. Cleland, 117 Mich. 45, 75 N. W. Rep. 129, 44 L. R. A. 163; McLean v. Charles Wright Medicine Co., 96 Mich. 479, 56 N. W. Rep. 68; Mandlebaum v. North American Min. Co., 4 Mich. 465.

[2] Felt v. Heye, 23 How. Pr. (N. Y.) 359; Colonial Bank v. Cady, 15 App. Cas. 267.

the title to stock, in equity at least, it is not necessary that it should be transferred upon the books of the corporation.[1] The pledgee may hold the certificate with the power of attorney, and have all the rights he could have from a transfer of the stock upon the books.

So, if a certificate of stock be assigned to one by a transfer not filled in, that is, by a transfer signed in blank, the holder of the certificate may effectually pledge it in that condition, though in doing so he makes an improper use of the stock. Equity will not give the assignor relief against a *bona fide* pledgee of the certificate, though the assignee pledges it in that condition, without having the stock first transferred to himself on the books of the corporation.[2]

III. *His Rights when Dealing with One Holding a Fiduciary Relation.*

§ 474. **One holding stock as "trustee" has prima facie no right to pledge it** to secure his own debt growing out of an independent transaction; and whoever takes it as security for such debt, without inquiry, does so at his peril.[3] If a certificate of stock issued in the name of "A. B., trustee," be pledged by him to secure his own debt, the pledgee is, by the

[1] See §§ 169–171, 219, 220.

[2] Otis v. Gardner, 105 Ill. 436, 15 Rep. 332.

[3] Shaw v. Spencer, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; Loring v. Salisbury Mills, 125 Mass. 138; Smith v. Burgess, 133 Mass. 511; Loring v. Brodie, 134 Mass. 453; O'Herron v. Gray, 168 Mass. 573, 47 N. E. Rep. 429; Duggan v. London & Canadian L. & A. Co., 19 Ontario 272, 278; Jaudon v. National City Bank, 8 Blatchf. 430; Duncan v. Jaudon, 15 Wall. 165; Gaston v. American Exch. Nat. Bank, 29 N. J. Eq. 98; and see Sprague v. Cocheco Manufacturing Co., 10 Blatchf. 173; Swan v. Produce Bank, 24 Hun (N. Y.) 277; First Nat. Bank v. National Broadway Bank, 156 N. Y. 459, 51 N. E. Rep. 398, 42 L. R. A. 139; Budd v. Munroe, 18 Hun (N. Y.) 316; Simons v. S. W. Railway Bank, 2 Am. L. Reg. 546; Ham v. Ham, 58 N. H. 70. See Ashton v. Atlantic Bank, 3 Allen (Mass.) 217, for a case decided on its own peculiar facts, but still going too far, perhaps, in protecting the lender from liability arising from a presumption of his knowledge that the pledge was made in violation of the trustee's duty. In connection with this case, see Loring v. Salisbury Mills, 125 Mass. 138, and Shaw v. Spencer, 100 Mass. 382, 391, 97 Am. Dec. 107, 1 Am. Rep. 115.

terms of the certificate, put upon inquiry as to the character and limitations of the trust. The effect of the word "trustee" is the same as if it had been A. B., trustee for C. D.[1] "Where one known to be a trustee is found pledging that which is known to be trust property, to secure a debt due from a firm of which he is a member, the act is one *prima facie* unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. The appropriation of corporate stock held in trust, as collateral security for the trustee's own debt, or a debt which he owes jointly with others, is a transaction so far beyond the ordinary scope of a trustee's authority, and out of the common course of business, as to be in itself a suspicious circumstance, imposing upon the creditor the duty of inquiry. This would hardly be controverted in a case where the stock was held by 'A. B., trustee for C. D.' But the effect of the word 'trustee' alone is the same. It means trustee for some one whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust*, than the property of one whose name is known. In either case, it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word 'trustee' alone has no meaning or legal effect.'"[2] This case, and the principles therein announced, are approved by the Chancellor of New Jersey in a recent case. There it was held that the fact that a certificate of stock is indorsed to a person as "trustee" is sufficient notice of the existence of the trust, whatever that may be; and that one who loans money to such person, on a pledge of such stock, has notice that the trustee is abusing his trust, and applying the money to his own purposes, when the loan is apparently for the private purposes of the borrower, and that fact would be revealed by inquiry.[3] "In this case," said the Chancellor,

[1] Shaw v. Spencer, 100 Mass. 382; Sturtevant v. Jaques, 14 Allen (Mass.) 523; and see Fisher v. Brown, 104 Mass. 259, 6 Am. Rep. 235.

[2] Per Foster, J., in Shaw v. Spencer, 100 Mass. 382.

[3] Gaston v. American Exch. Nat. Bank, 29 N. J. Eq. 98.

"one of two innocent parties must suffer,—the bank (which made the loan) or the *cestuis que trust;* and it is but just that the loss should fall on the former, which might, by the exercise of reasonable care, have protected itself. In such cases reasonable care is a duty. The trustee proposed to borrow money on his individual account for his own use, and to secure the repayment of it by the pledge of stock which on its face bore evidence that it was not his own, but the property of some one else, for whom he held it in a fiduciary capacity, and that he had no right to pledge it for his own debt. The bank, without a question, even to him, so far as appears, as to his right to pledge the stock, and without any inquiry whatever on the subject, lent him the money and accepted the security. One hundred shares of the stock still stood on the books of the company in the name of the trustee's immediate predecessor in the trust. As to all of the stock, the fact that it was held in trust was known to the bank. It was not misled by any statement or representation. It chose to assume that inquiry was unnecessary, and to rely on the character of the trustee as a guaranty for the lawfulness of the transaction, and the propriety of his conduct in dealing with the trust property. The loss should, as before remarked, in equity fall on it rather than on the *cestuis que trust.*"

There was a similar case in Pennsylvania of a lender advancing his money on certificates of stock, expressed on their face as held by the borrower in trust for some other party, and making no effort either to ascertain who that party was, or whether the funds proposed to be raised on the securities were *bona fide* intended to be applied for the purposes of the trust. "A loan made under such circumstances," say the court,[1] "is

[1] Walsh v. Stille, 2 Pars. Eq. (Pa.) 17, 23. Per King, Pres't, J.: "In the first place it was manifest, from the face of the certificates, that Stille did not hold the stocks in his own right, but in a fiduciary character for some other person. In the answer, Bridges (the lender) does not say that he ever made any inquiry of Stille on the subject, a circumstance in itself suspicious. One would suppose that any prudent man, when such securities were offered to him by a party whose character was so distinctly expressed, would have demanded by what authority he proposed making use of

at the peril of the lender. In Maples v. Medlin,[1] on the soundest principles it was ruled, that to make a purchaser of the legal estate a trustee for the *cestui que trust* it is not necessary that he should have notice of the particular *cestui que trust*. It is sufficient if he has notice that the person from whom he purchased is a *trustee*."

§ 475. **A certificate of stock issued to "the estate of" a deceased person** is notice to a pledgee that the stock is affected by a trust. If, therefore, in order to carry out the provision of a will giving the income of certain real estate to the testator's wife for life, by agreement of all the parties interested they sell the real estate, and the executors invest the proceeds in certain stock, taking the certificate in the manner indicated, inasmuch as the executors really hold the shares in trust, and not in their capacity of executors, one of them can not make an effectual pledge of the shares to secure a debt of his own, by indorsing the certificate in his own name as executor.[2]

One taking shares of stock from a trustee as security for his own debt is affected by any notice of the fact that the shares are held in trust, whether such notice be contained in the certificate or the assignment of it, or be derived information outside the papers in the transaction.[3]

§ 475a. **In like manner if a guardian indorse his ward's certificate of stock in blank,** "A by B, Guardian," any one taking it in pledge is put upon inquiry as to the guardian's authority.

A guardian deposited a certificate of stock owned by and standing in the name of his ward in a bank for safe keeping, and subsequently borrowed money from the bank for his per-

them, and for what purpose, consistent with his duty as trustee, he intended to use the money raised from them. Nor would a cautious lender have been satisfied with the mere say-so of the trustee. He would and ought to have applied to the corporations, in order, if practicable, to ascertain from that source who was the true party interested beneficially in them."

[1] 1 Murphy (N. C.) 219, 3 Am. Dec. 687.

[2] Ham v. Ham, 58 N. H. 70; and see Pannell v. Hurley, 2 Coll. 241.

[3] Blake v. Traders' Nat. Bank, 145 Mass. 13, 12 N. E. Rep. 414.

sonal use, for which he gave his note and indorsed his ward's certificate as above and deposited it as collateral security for the payment of his note. The note was afterward paid by the guardian, but before its payment the cashier of the bank fraudulently pledged the certificate for his personal debt to one who took it without notice of the cashier's want of authority to pledge it, and supposing him to be in rightful possession thereof. The pledgee then took the certificate to the office of the company issuing it, and asked for a transfer of the stock and for a certificate thereof in his own name, and upon the refusal of the company to make the transfer without the authority of the probate court, the cashier, at the request of the pledgee, on a petition signed "B., guardian, by C.," the cashier, of which neither the guardian nor ward had any knowledge, by publication or otherwise, procured such a decree, and the stock was transferred and a new certificate thereof issued to the pledgee. It was held, that the ward was entitled to a decree against the pledgee for the transfer and delivery of the certificate of stock, and the payment of all the dividends received thereon by him, and since there was no privity between the bank and the pledgee, the fact that the bank was paying the expenses of the plaintiff's litigation is immaterial.[1]

§ 476. **One of two trustees can not, without the consent of his co-trustee, pledge the trust property;** and a person taking such a pledge with notice of the trust acquires no title to the property.[2] The fact that a certificate of stock is issued to "the estate of" a person deceased is notice of the trust to one who takes it in pledge from one of two executors.[3]

§ 477. **A corporation whose stock is transferred upon its books by a trustee or executor to secure a loan to himself may be liable** for permitting the transfer, when its officers have good reason to know that the trustee or executor is violating

[1] O'Herron v. Gray, 168 Mass. 573, 47 N. E. Rep. 429.

[2] Ham v. Ham, 58 N. H. 70; Cottam v. Eastern Counties R. Co., 1 Johns. & H. 243.

[3] Ham v. Ham, 58 N. H. 70.

his trust.[1] In a case in the circuit court of the United States for Maryland, holding a bank liable for permitting such a transfer, Chief Justice Taney said:[2] "Undoubtedly, the mere act of permitting this stock to be transferred by one of the executors, furnishes no ground for complaint against the bank, although it turns out that the executor was, by the act of transfer, converting the property to his own use; for an executor may sell or raise money on the property of the deceased, in the regular execution of his duty; and the party dealing with him is not bound to inquire into his object, nor liable for his misapplication of the money. * * * But if these officers, at the time of the transfer, had reason to believe that the executor, by the act of transfer, was converting this stock to his own use, in violation of his duty, then the bank, by permitting the transfer knowingly, enabled the executor to commit a breach of his trust, and upon principles of justice and equity is as fully liable as if it had shared in the profits of the transaction. The object of the executor could not have been accomplished without the co-operation of the bank, in permitting the transfer to be made on its books."

§ 478. **One who takes in pledge shares of stock knowing that the pledgor holds them in trust** and that he is using them to secure his own debt, can not hold them as against the beneficial owner, though there is nothing upon the face of the certificate to indicate such trust.[3]

If a trustee without authority under the trust but at the request of the sole beneficiary for life, and for his benefit, pledges stock certificates belonging to the trust estate, made

[1] Magwood v. Railroad Bank, 5 S. C. 379; Loring v. Salisbury Mills, 125 Mass. 138.

[2] Lowry v. Commercial and Farmers' Bank of Baltimore, Taney 310, 330.

In this case the transfer was not made until after the lapse of eight years after the testator's death, at which time the bank was bound to presume that the testator's debts had been paid, and was bound to know that the executor had no implied authority to sell the testator's stock.

[3] Crocker v. Crocker, 31 N. Y. 507, 88 Am. Dec. 291; Loring v. Brodie, 134 Mass. 453.

out in the name of the trustee, the pledgee being bound to investigate the trustee's power to pledge, is not entitled, on default in the payment of the loan, to the stock, but he may be entitled to the dividends accumulated and to be declared thereon during the life of the beneficiary who authorized the pledge and whose business was benefited thereby, if the beneficiary was not incapable of alienating his interest.[1] The court of appeals of New York in the case cited said: "Knowledge of the trustee's violation of the trust conditions will be chargeable to the person dealing with him, if the facts were such as, in reason, to put him upon inquiry and to require him to make some investigation, as the result of which the true title and authority of the trustee might have been disclosed. He will, then, be regarded as having constructive notice of the terms of the trust, whence the trustee derives his power to act. Reference may be had to the following text-books and decisions, as showing the general rule under which those dealing with trustees are affected with notice of the terms of the trust."[2]

§ 478a. **If a pledgee takes negotiable bonds as collateral security in good faith and without notice that the pledgor held them in trust** and had no right to pledge them, a purchaser or assignee of the bonds from such pledgee may take the bonds discharged of all equitable claims under the trust, although such purchaser or assignee had notice of the trust at the time he took them.[3] But where one knowing the trust character of certain bonds, and that the trustee held them and had pledged them to certain banks in violation of the trust, agreed with

[1] First Nat. Bank. v. National Broadway Bank, 156 N. Y. 459, 51 N. E. Rep. 398, 42 L. R. A. 139, 22 App. Div. 24, 47 N. Y. Supp. 880.

[2] Citing 1 Story Eq. Jur., § 400; 2 Perry on Trusts, § 831; Acer v. Westcott, 46 N.Y. 384, 7 Am. Rep. 355; Wetmore v. Porter, 92 N. Y. 76; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. Rep. 115; Kirsch v. Tozier, 143 N. Y. 390, 38 N. E. Rep. 375; Anderson v. Blood, 152 N. Y. 285, 46 N. E. Rep. 493; Duncan v. Jaudon, 15 Wall. 165; Shaw v. Spencer, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; Suarez v. De Montigny, 1 App. Div. 494, 37 N. Y. Supp. 503.

[3] Perry on Trusts (4th ed.), § 222.

the trustee to procure him money to pay the bank loans, and to receive from him the bonds as collateral, and thereupon gave the banks his own note in payment of the trustee's note, and re-pledged to them the bonds as collateral, it was held that the rule which protects the purchaser with knowledge, provided he buys from a *bona fide* holder for value and without notice, had no application, as the last pledgor must be regarded as having received the bonds from the trustee rather than from the banks.[1]

§ 479. **A person in good faith loaning money upon certificates of stock which do not indicate any trust,** is not bound to examine the books of the corporation, or to look beyond the certificate assigned to him to ascertain the validity of former assignments; and his title is not affected by the fact that the stock was originally held by the borrower as "trustee" for a third person, and that the borrower had by mesne conveyances fraudulently obtained a transfer to himself, making the pledge in question to secure his own debt.[2] The corporation itself is liable in damages to the *cestui que trust* for negligently recording a transfer by the trustee, when it has knowledge that the present holder is a trustee, and also has knowledge of the name of the *cestui que trust.*[3]

§ 480. **But contrary to the better and prevailing rule, it has been held in Maryland and California,** that the addition of the word "trustee" in a certificate of stock does not show that the person to whom it is issued has not the full right to pledge it

[1] Ketchum v. Packer, 65 Conn. 544, 33 Atl. Rep. 499.

[2] Salisbury Mills v. Townsend, 109 Mass. 115; Atkinson v. Atkinson, 8 Allen (Mass.) 15; Crocker v. Crocker, 31 N. Y. 507, 88 Am. Dec. 291; Winter v. Montgomery Gas-Light Co., 89 Ala. 544, 7 So. Rep. 773; Bayard v. Farmers' & Mechanics' Bank, 52 Pa. St. 232; Lowry v. Commercial & Farmers' Bank, Taney 310.

[3] Loring v. Salisbury Mills, 125 Mass. 138; and see Salisbury Mills v. Townsend, 109 Mass. 115, per Chapman, C. J.; Pratt v. Taunton Copper Co., 123 Mass. 110, 25 Am. Rep. 37; Pollock v. National Bank, 7 N. Y. 274, 278, 37 Am. Dec. 520; Telegraph Co. v. Davenport, 97 U. S. 369; and see Willis v. Phila. & Darby R. Co., 6 Weekly Notes Cas. 461.

as his own, nor give the person dealing with him notice that any other person has any interest in the same.[1] "All that is intended to be decided is, that the mere addition of the word 'trustee' after the name in the certificate is not, in this state, of itself, nothing more appearing, to be deemed constructive notice of the equities of a secret owner of the stock. If it is intended that the so-called trustee shall not have power to sell or hypothecate the stock, without the express consent of the equitable owner, it is an easy matter to limit his authority by apt words in the certificate."[2] Moreover, it is declared that if the word raises a presumption that some one else is the owner, it may be inferred that the latter, in clothing the trustee with the legal title, invested him with authority to sell in the usual course of business. "Considerations of public policy and common justice demand that when stock is placed in the name of a trustee under these circumstances, the secret owner shall be bound by the act of his trustee dealing with persons who have no actual notice of the relations between the parties."[3]

§ 481. **There is a material distinction between pledges by executors or administrators and pledges by trustees;** for a sale and transfer of stock is ordinarily in the line of duty for the former; but trustees presumptively hold trust property as an investment for their *cestuis que trust*.[4] Therefore,

[1] Albert v. Savings Bank of Baltimore, 1 Md. Ch. 407, affirmed 2 Md. 159; Thompson v. Toland, 48 Cal. 99; Winter v. Belmont Mining Co., 53 Cal. 428. See, however, Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

[2] Brewster v. Sime, 42 Cal. 139, 144.

[3] Brewster v. Sime, 42 Cal. 139, 144, per Crockett, J.

[4] Prall v. Tilt, 28 N. J. Eq. 479, 484, per Green, J.; Gaston v. Am. Exch. Nat. Bank, 29 N. J. Eq. 98, 102, per Runyon, Chancellor; Bayard v. Farmers' & Mechanics' Bank, 52 Pa. St. 232, per Strong, J.; Leitch v. Wells, 48 N. Y. 585; Jaudon v. Nat. City Bank, 8 Blatchf. 430; and see Nutting v. Thomason, 46 Ga. 34; Stinson v. Thornton, 56 Ga. 377; Carter v. Nat. Bank of Lewiston, 71 Me. 448, 453. In this case the court say: "The law recognizes a distinction between an ordinary trustee and an executor. The former has possession for custody and the latter for administration. The latter has a necessary incidental power of disposal which the former does not. And as a consequence when one purchases of the latter stocks or other securities bearing on their face the revelation of a trust, he may do so safely in the absence of no-

while mere knowledge that an executor or administrator is dealing in a fiduciary capacity with assets of the estate is not enough to raise a suspicion or to put one dealing with him upon inquiry, such knowledge affects one dealing with a trustee with notice of the terms of the trust. One taking stock in pledge from a trustee deals with it at his peril, for there is no presumption that the trustee has a right to dispose of it, as there is in the case of an executor.[1] It is negligence in one taking stock in pledge for loans to a trustee to act without inquiry; and certainly if the pledgee has reasonable ground for believing that the trustee intends to apply the money obtained upon such loans to his private uses, he will be regarded as co-operating in a breach of trust.[2]

The fact that a trustee has power to sell the trust property, and to change investments, gives him no authority to pledge it.[3]

A direction in a trust instrument, for the reinvestment of the proceeds of sales of trust securities, implies that the settler did not intend that the securities should be pledged.[4]

§ 482. **For the purposes of administration, the title of an executor is absolute,** and a purchaser or pledgee from him of personalty of the estate is neither required to notice the provisions of the testator's will, nor made liable for the executor's misapplication of the purchase-money.[5] To require evidence

tice or knowledge of any intended breach of trust on the part of the executor; but if he purchase like trust property of an ordinary trustee the law imposes upon him the duty of inquiring into the right of the trustee to change the securities."

[1] Wood's Appeal, 92 Pa. St. 379.

[2] Jaudon v. Nat. City Bank, 8 Blatchf. 430; Duncan v. Jaudon, 15 Wall. 165; Lowry v. Commercial & Farmers' Bank, Taney 310.

[3] Loring v. Brodie, 134 Mass. 453; First Nat. Bank v. Nat. Broadway Bank, 156 N. Y. 459, 471, 51 N. E. Rep. 398, 42 L. R. A. 139, 22 App. Div. 24, 47 N. Y. Supp. 880; Albany F. Ins. Co. v. Bay, 4 N. Y. 9, 19.

[4] First Nat. Bank v. Nat. Broadway Bank, 156 N. Y. 459, 51 N. E. Rep. 398.

[5] Russell v. Plaice, 18 Beav. 21: Cruikshank v. Duffin, L. R. 13 Eq. 555; Tyrrell v. Morris, 1 Dev. & B. Eq. (N. C.) 559; Vane v. Rigden, L. R. 5 Ch. App. 663. In the latter case Lord Hatherly said: "Lord Thurlow expressed his opinion clearly to be that the executor is at liberty either

of authority beyond the letters testamentary, might greatly delay and embarrass the executor in the discharge of his duties.[1] The executor has an inherent right to sell the personal assets of the estate, and the same right to pledge them; and the purchaser in the one case, or the creditor in the other, has no concern with the purpose for which the executor makes the sale or pledge. The executor is liable to those interested in the estate for any misapplication of the assets; but the purchaser or pledgee is not bound to know whether the money obtained is required for the payment of debts of the estate, or in

to sell or pledge the assets of the testator. Scott v. Tyler, 2 Dick. 712, 725. In fact he has complete and absolute control over the property, and it is for the safety of manhood that it should be so; and nothing which he does can be disputed, except on the ground of fraud or collusion between him and the creditor." And Sir W. M. James in the same case said: "It seems to me to be settled on principle, as well as by authority, that an executor has full right to mortgage as well as to sell; and it would be very inconvenient and very disastrous if the executor were obliged immediately to convert into money by sale every part of the assets of the testator. It is a very common practice for an executor to obtain an advance from a banker for the immediate wants of the estate by depositing securities. It would be a strange thing if that could not be done."

The American cases are to the same effect. Smith v. Ayer, 101 U. S. 320; Drake v. Cloonan, 99 Mich. 121, 27 N. W. Rep. 1098; Hemmy v. Hawkins, 102 Wis. 56, 78 N. W. Rep. 177.

[1] Bayard v. Farmers' & Mechanics' Bank, 52 Pa. St 232; Wood's Appeal, 92 Pa. St. 379; Goodwin v. Am. Nat. Bank, 48 Conn. 550, 13 Rep. 268; Carter v. Nat. Bank of Lewiston, 71 Me. 448. Mr. Justice Virgin in that case said: "As a necessary incident to the execution of the will and the administration of the estate, the power to dispose of the personal estate is given to the executor. And no general proposition of law is better established than that an executor has an absolute control over all the personal effects of his testator.

"While it is the duty of an executor to use reasonable diligence in converting assets into money for the general purposes of the will, the law permits him to exercise a sound discretion as to the time, within a limited period, when he will sell. And high authority has declared that circumstances may exist in which it is certainly not wrong in him, although it may not be a positive duty, to make advances for the benefit of the estate and reimburse himself therefrom. Munroe v. Holmes, 13 Allen 109, 110. If he may advance his own money for the general purposes of the will and may sell the personal effects for the like object, it is difficult to see why, in the absence of any prohibitory provision in the will, he may not mortgage or pledge the assets for the same purpose; and the great weight of authority so holds."

fact to know anything about the estate beyond the executor's appointment.[1] The same rule applies to administrators. "The law casts the legal ownership of personal property of a deceased intestate upon his administrators. They are sometimes said to be trustees, but they are such for administration. Their primary duty always is to dispose of the personal property, and therewith pay the debts of the intestate and make distribution among his next of kin. A sale and transfer of stock by them is therefore in the line of their duty. There is no *cestui que trust* having a right to interfere and prevent such a transfer. Hence letters of administration are always sufficient evidence of authority."[2]

A foreign executor or administrator can generally make a valid transfer of shares of stock. For this purpose there is not the occasion that there is when an executor or administrator assigns a mortgage that his authority to act should appear by letters granted in the state where the land is situated.[3]

By statute in Pennsylvania foreign executors and administrators are invested with authority over shares of stock of incorporated companies within that state standing in the names of decedents; and therefore, in the absence of any provision in the by-laws or articles of association of a national bank to the contrary, such a bank is bound to recognize a transfer of its stock by a foreign executor only appointed in another state.[4]

§ 483. **One of several executors has the same power to dispose of his testator's personalty that all the executors have jointly.** One executor may pledge a note belonging to the estate of his testator, or may pledge stock belonging to it as collateral security for a debt of the estate;[5] and the pledgee is

[1] Leitch v. Wells, 48 N. Y. 585; Hutchins v. State Bank, 12 Met. (Mass.) 421; and see Petrie v. Clark, 11 S. & R. (Pa.) 377, 14 Am. Dec. 636; Drake v. Cloonan, 99 Mich. 121, 57 N. W. Rep. 1098.

[2] Bayard v. Farmers' & Mechanics' Bank, 52 Pa. St. 232, 235, per Strong, J. The above case led to the passage of stat. 23, May, 1874, Purdon 1942.

[3] Jones on Mortgages, § 797.

[4] Hobbs v. Western Nat. Bank, 8 Weekly Notes Cas. 131.

[5] Wheeler v. Wheeler, 9 Cow. (N.Y.) 34.

not bound to inquire or to know in any particular case whether the executor is obtaining the money for that purpose or for his own benefit. "Co-executors are regarded in law as an individual person; and the acts of any one of them, in respect to the administration of the effects, are deemed to be the acts of all; as where one releases a debt or settles an account of a person with the deceased, or surrenders a term, or sells the goods and chattels of the estate, his acts bind the others."[1] One of four executors placed in the hands of his brokers certain certificates of stock which belonged to the estate of his testator. These certificates were pledged as collateral security for the personal indebtedness of this individul executor, and were accompanied by a blank bill of sale and a power of attorney signed by him as acting executor. The brokers in turn pledged the stock to one who advanced money to them in the belief that the brokers were the real owners of the stock. Upon a bill in equity filed by the remaining executors to recover the stock, it was held that the same principle which prevails in the case of an absolute owner applies in the case of an executor who invests the holder of certificates of stocks with apparent ownership, and that there could be no recovery of the stock until the advances made thereon were paid.[2]

§ 484. **A trustee of an insolvent debtor,** whose duty is like that of an executor or administrator, to dispose of the property and distribute it, would probably stand upon the same footing.[3] He does not hold the property for custody but for administration.

§ 485. **Knowledge that an executor or administrator is misappropriating securities.** An exception, however, has been made in respect to cases in which an executor or administrator personally borrows money upon the security of a certificate of stock belonging to the estate in his charge, in such a way that

[1] Wood's Appeal, 92 Pa. St. 379, per Trunkey, J.

[2] Wood's Appeal, 92 Pa. St. 379.

[3] Bayard v. Farmers' & Mechanics' Bank, 52 Pa. St. 232, 235, per Strong, J.

the person dealing with him knew, or might have known, that such representative was using the securities of the estate for his own debts; and in such cases it has been held that a person having knowledge of the representative's fraudulent conversion of stock belonging to the trust fund, can acquire from him no title to it.[1]

The distinction between a case where one dealing with an executor has knowledge that he is abusing his trust in using for himself or for another stock belonging to the estate, and a case where one dealing with an executor or administrator in relation to such stock is led to believe that he is using it legitimately, is well illustrated by two recent cases in New Jersey arising out of the administration of the same estate. In the one case[2] the executrix, who was the widow of the testator, assigned certain stock belonging to the estate as collateral security for the debt of two of her sons, who with other children of hers were interested in the estate. The will gave a life estate in the property to the widow, with power of sale and reinvestment; and after her death the property was to go to all the children; although in a certain contingency the executrix was authorized to advance a certain sum to each of the sons whose debts she secured. The certificates of stock so assigned stood in the name of the testator, and the sons' creditor knew at the time of the transfer that the stock belonged to the estate.

[1] Smith v. Ayer, 101 U. S. 320, 326; Wood v. Ellis (Court of Com. Pleas Pa.), 31 Leg. Int. 140; affirmed in the Supreme Court in Ellis's Appeal, 8 Weekly Notes Cas. 538; Williamson v. Morton, 2 Md. Ch. 94; Albert v. Savings Bank of Baltimore, 2 Md. 159; Ashton v. Atlantic Bank, 3 Allen (Mass.) 217; Nicholls v. Peak, 12 N. J. Eq. 69; Dey v. Dey, 26 N. J. Eq. 182; Abbott v. Reeves, 49 Pa. St. 494, 88 Am. Dec. 510; Pendleton v. Fay, 2 Paige (N. Y.) 202; Bell v. Farmers' Deposit Nat. Bank, 131 Pa. St. 318, 18 Atl. Rep. 1079; Gottberg v. United States Nat. Bank, 131 N. Y. 595, 30 N. E. Rep. 41; People v. American Loan & T. Co., 2 App. Div. 193, 37 N. Y. Supp. 780.

And see Hill v. Simpson, 7 Ves. 152, 168; Collinson v. Lister, 7 DeG. M. & G. 633; Dodson v. Simpson, 2 Rand. (Va.) 294; Christmas v. Mitchell, 3 Ired. Eq. (N. C.) 535; Williamson v. Branch Bank of Mobile, 7 Ala. 906, 42 Am. Dec. 617; Haynes v. Forshaw, 11 Hare 93; Wilson v. Moore, 1 Mylne & K. 337; Colt v. Lasnier, 9 Cow. (N. Y.) 320; Miller v. Williamson, 5 Md. 219; Carter v. Nat. Bank of Lewiston, 71 Me. 448.

[2] Prall v. Hamil, 28 N. J. Eq. 66.

The sons were in business, and the stock was assigned to give them credit for goods to be purchased. The creditor may very likely have thought that the executrix had a legal right to pledge the stock as security for the credit to be given the sons. But that was held not to be enough to protect him in the possession of the stock; for he knew that the executrix was not disposing of it in the course of administration, but was pledging it as executrix, to secure credit for her sons in their private business; a purpose obviously and confessedly not connected with her trust as executrix, and it was his duty to inquire as to her authority so to deal with the stock. Having disregarded this duty he could not successfully claim protection on the ground of *bona fides* and ignorance.

In the other case the same sons obtained credit with another person by pledging stock as collateral security. The creditor undoubtedly knew that the stock had belonged to the testator, and that at the time of the negotiation it still stood in his name on the books of the company, as appeared by the certificates, for these were delivered to him by the sons with a power of attorney in blank for the transfers, duly executed by the executrix. The circumstances distinguishing this case from the other are that the application for credit was made by one of the sons, who represented that the stock in question belonged to himself and his brother, and had been acquired by them on account of their interest in the estate. This statement was corroborated by the executrix in delivering to her sons the certificates and her blank power of attorney to transfer the stock. The creditor in this case dealt with the sons, who held the certificates and dealt with them as their own property, by virtue of a title valid upon its face, although derived from the executrix; while the creditor in the other case received and dealt with the stock as the property of the estate.

§ 486. **Knowledge that an executor is perverting the personal assets of the estate** in his hands to his own use is im-

[1] Prall v. Tilt, 28 N. J. Eq. 479, affirming 27 N. J. Eq. 393.

puted to a pledgee, from knowledge that he is using a promissory note belonging to such estate as collateral security for money borrowed for the use of a commercial firm of which the executor was a member.[1] The pledgee dealing with the executor is bound to look into his authority, and is held to a knowledge of all the limitations thereon imposed by law or by the will under which he acts. Such knowledge of the trust as should put the pledgee upon inquiry will charge him with actual knowledge of the trust.[2]

Stocks, promissory notes, or other personal assets taken by a pledgee with knowledge that the executor or administrator is acting in violation of his trust, and in disregard of its obligations, may be followed and recovered of such pledgee.[3]

§ 487. **The fact that an executor pledges a certificate of stock issued to him as executor, to secure his own note,** is not conclusive notice to the pledgee that the executor is procuring the money for his own private use. On the contrary, if the pledgee makes a loan upon such note and security in good faith, and relying upon the executor's affirmation that the money is wanted for the settlement of the estate, the pledge is valid.[4]

[1] Smith v. Ayer, 101 U. S. 320; Thomasson v. Brown, 43 Ind. 203; Prosser v. Leatherman, 4 How. (Miss.) 237, 34 Am. Dec. 121; Loring v. Brodie, 134 Mass. 453.

[2] Ellis's Appeal, 8 Weekly Notes Cas. 538; Webb v. Graniteville Mfg. Co., 11 S. C. 396, 32 Am. Rep. 479.

[3] Smith v. Ayer, 101 U. S. 320; Thomasson v. Brown, 43 Ind. 203.

[4] Carter v. Nat. Bank of Lewiston, 71 Me. 448. Virgin, J., said: "The note could not be collected against the estate, for it was the personal note of the executor. He could not create a debt in that manner against the estate. And if the money was thereby procured for his own private use, and the bank knew it at the time, the transfer of the stock would be a *devastavit*, and could not be upheld. If the note had been given to the bank for a private debt due to the bank from the executors, created before or during his executorship, but independent thereof, it would come within the principle of the numerous cases before cited, where the transaction itself would speak and conclude the bank. But if given as a voucher for money obtained for a legitimate purpose connected with a *bona fide* administration of the will, then, though the executor alone was made liable for its payment, the transaction would be legitimate, and the estate would have

Where, therefore, in an action against a bank to recover certain railroad bonds registered originally in the names of the executors of an estate, which had been pledged by one of the executors as security for a loan, the only facts proved aside from the registering were that the note given for the loan was signed by the borrower individually, without adding the word executor, and that the check given for the loan was drawn to his individual order, it was held that the evidence failed to charge defendant with notice of an intent on the part of the co-executor to misappropriate the money loaned, and so that the action was not maintainable.[1]

§ 488. **The same facts that are notice to an individual are notice to a corporation** that an executor or administrator borrowing money of him is committing a breach of trust. "If a banking company has what is called a branch bank, managed or superintended by a local agent, who, in that character advances money of the banking company, by way of loan, knowing at the time facts which render the loan an improper transaction, and would prevent the agent from sustaining it were the transaction his own,—as in the instance of a trustee borrowing money in that character, who, by the very act of so borrowing, commits a breach of trust, having sought and obtained the money for the sole purpose of misapplying it, and the circumstances being all known at the time to the agent lending,—I apprehend it to be clear that the banking company acquire no better title than the agent would have done had the case been his own, or than the trustee."[2]

no reason for complaint. The case finds 'that the money was loaned in good faith by the bank, and, upon the statement made by Cook, that the same was wanted in the settlement of the estate.' The presumption is, that he was acting faithfully. There is no evidence to the contrary, and the presumption must stand." The doctrine of this case is recognized in Pettingill v. Pettingill, 60 Me. 412, 425. See Colonial Bank v. Cady, 15 App. Cas. 265.

[1] Gottberg v. United States Nat. Bank, 131 N. Y. 595, 30 N. E. Rep. 41, 42 N. Y. St. Rep. 883, affirming 40 N. Y. St. Rep. 910.

[2] Collinson v. Lister, 7 De G. M. & G. 633, per Knight Bruce, L. J.

§ 489. **A pledgee is not bound to see to the proper application of the proceeds of a loan** obtained by an executor. Thus, an executor having power either to pay certain legacies or to hold a portion of the estate in trust, and to pay the income thereof to the legatees during their lives, represented to a bank that he desired to pay the legacies, and that it would be to the advantage of the estate to obtain a loan upon a pledge of certain stock, so as not to be obliged to sell this until there should be a more favorable condition of the market. The loan was made upon his note as executor, secured by the stock, and the proceeds were placed to his private account in the bank. Shortly afterwards he transferred a part of the proceeds to another account kept by him in the bank as town treasurer. The note was renewed from time to time for four years, when the executor left the state a defaulter. It was held that no knowledge of actual fraud, either accomplished or intended, was to be imputed to the bank from these circumstances, and that there was no duty laid upon the bank to see to the application of the money. The declared purpose of the loan was one for which the bank could safely make the loan.[1] The money obtained upon the loan became so far his own that he was entitled to take possession of it, or place it to his own private account, to transfer it from one account to another, or to draw it out, without imposing upon the bank any obligation to know or suspect that he was committing a fraud in his trust. Neither was any knowledge of fraud, accomplished or intended, imputed to the bank from the fact that the executor transferred money from his own account to his account as treasurer, and drew checks upon the latter account, payable to himself or bearer. The bank was "not required to assume the hazard of correctly reading in each check the purpose of the drawer." Nor was the continuance and renewal of the loan a circumstance from which the bank should be charged with knowledge of the executor's fraudulent purpose. The reason for borrowing was also a reason for continuing the loan.

[1] Goodwin v. Am. Nat. Bank, 48 Conn. 550, 13 Rep. 268.

§ 490. **The same rule is applied to dealings with persons occupying other fiduciary relations,** which *prima facie* give them no power of disposal of the trust property, such as guardian, receiver, master in chancery, or officer of a corporation. One dealing with persons occupying such positions of trust, with notice that they are using trust property for their private use, is not entitled to protection as a *bona fide* purchaser.[1] "It is an undoubted principle of equity," say the supreme Court of Pennsylvania,[2] "that the owner of property may follow and reclaim it wherever he can find and identify it, until arrested in the pursuit by the countervailing equity of a *bona fide* purchaser, for a valuable consideration paid. A purchaser with notice that the sale is a breach of trust, or a fraud upon the rights of the real owner, is *particeps criminis* with the fraudulent vendor, and ~~his~~ purchase can not protect him against the owner, because such a purchase is not *bona fide*. Notice is either actual or constructive. Constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. Whatever is sufficient to put a party upon inquiry, is in equity held to be good notice to bind him. Where a purchaser can not make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact; so he is supposed to have knowledge of the instrument under which the party with whom he contracts as executor, or trustee, or appointee, derives his power."

§ 491. **These principles have been applied to the case of a pledge of municipal bonds by the president of a railroad company,** to which the bonds were issued and to which they belonged, as collateral security for the president's own debt; and it appearing upon the face of the bonds that they were issued

[1] Atkinson v. Atkinson, 8 Allen (Mass.) 15; Jaudon v. National City Bank, 8 Blatchf. 430; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; Mulligan v. Wallace, 3 Rich. Eq. (S. C.) 111; Webb v. Graniteville Manuf. Co., 11 S. C. 396, 32 Am. Rep. 479.

[2] Garrard v. Pittsburgh & Connellsville R. Co., 29 Pa. St. 154.

to the railroad company, and that they were indorsed in blank by the president in behalf of the company, it was held that one taking the bonds as security for an existing individual debt of the president himself, was bound to inquire into his authority to make the transfer; and the inquirer would have found that the president had authority merely to negotiate the bonds for the benefit of the company. The court say that one purchasing the bonds from the president for a money consideration would have purchased in pursuance of the power, and would not have been affected by any subsequent misapplication of the funds by the president. But when a creditor of the president's took the bonds as collateral security for his individual debt, the creditor became a party to the misapplication and the breach of trust. Even if the blank left for the name of the assignee had been filled up with that of the president himself, at the time his creditor took it, there would still have been sufficient to put him upon inquiry, because the president had no right to sell to himself as an individual. But the blank in the assignment was sufficient to show any man of ordinary prudence that it was an unfinished paper, placed in his hands as a convenient mode of executing the power to sell for the benefit of the company. When the chief officer of a corporation is found in possession of its securities, his possession is, as a general rule, presumed to be the possession of the corporation. The pledgee in this case was accordingly held to be affected with constructive notice of the rights of the corporation in the bonds so pledged.[1]

§ 492. **In Georgia it is provided by the code that all sales by an administrator shall be public.** In violation of this, an administrator sold at private sale certain stock belonging to the estate of the intestate, and the purchasers resold the same to the defendants, who were *bona fide* purchasers. Whether the intermediate transfer of the stock was or was not registered upon the books of the company does not clearly appear. "The

[1] Garrard v. Pittsburgh & Connelsville R. Co., 29 Pa. St. 154.

question is," said the court, "if the administrator of the estate does collude with the purchaser of the stock, and sells it to him at private sale, and such purchaser of the stock at private sale afterwards sells it to a *bona fide* purchaser for value, without notice that it was purchased of the administrator at private sale, in fraud of the rights of the parties interested therein, will such *bona fide* purchaser of the stock be protected in a court of equity? This is an important question to the purchasers of stock in railroad companies. It was said, on the argument of this case, that the *bona fide* purchaser of this stock stood in no better condition than the *bona fide* purchaser of stolen property; that inasmuch as the thief had no title to the property stolen, those who purchased it from him, or derived title under or through him, acquired no better title than he had, and he having none, the *bona fide* purchaser would acquire none." But the court admitting that, as between the original parties, the transaction was undoubtedly invalid to divest the title of the legatees, held that the analogy had no application whatever as to subsequent purchasers, and that the latter were entitled to the protection of the court, when they have purchased in good faith for value, without notice of the fraud in the sale by the administrator.[1]

§ 493. **One taking a pledge of stock from another who is professedly acting as an agent** can not infer the agent's authority to pledge the stock as collateral from the fact that he holds a certificate with an irrevocable power of attorney to transfer it, signed by the owner. Such a certificate and power of transfer confer upon the holder the apparent legal and equitable title "only when he appears to be the real owner of the stock." One dealing with a person whom he knows to be only an agent, or with a person who professes to be only an agent, is bound to inquire and to know what his authority is. Thus, a person holding a certificate of stock as collateral for a loan of $3,000, applied to a bank for a loan of $8,000 upon this

[1] Nutting v. Thomason, 46 Ga. 34. See, also, Stinson v. Thornton, 56 Ga. 377; Ross v. Southwestern R. Co., 53 Ga. 514.

certificate, stating that he wanted it for a client. The bank agreed to make the loan if the applicant would procure a proper power of attorney to be attached to the certificate. The holder of the certificate by representing to the owner that he ought to have the instrument to secure his loan, procured from the owner a transfer and irrevocable power of attorney to make a transfer executed in blank. The pledgee filled up the blanks, save the name of the transferee and attorney, and delivered it with the certificate to the bank, which thereupon made the loan. The pledgee had no authority from the owner to repledge the stock, and the latter never received any part of the money procured from the bank upon the stock. In an action by the bank to foreclose the pledge it was held that the owner was not estopped from asserting his title to the stock, and that the bank could assert a lien only for the amount for which the owner had pledged the stock; that while the transfer and power of attorney would have given to the first pledgee an apparent ownership in case he had claimed title, or an apparent authority to sell as agent, it did not hold him out as authorized to make a loan or to pledge the stock, or at most it only indicated that he could pledge the stock for an authorized loan. All the evidence the bank had of his authority to obtain a loan upon the stock was his naked assertion; and upon this assertion it relied at its own risk. The owner did not hold him out as authorized to borrow money for himself; and hence the owner is not estopped from denying such authority.[1]

§ 494. **A broker who buys stock on an order from another broker, knowing or having reason to know that the latter is acting only as an agent** for an undisclosed principal, has no right in consequence of the omission to name the principal,

[1] Merchants' Bank v. Livingston, 74 N. Y. 223.

Pending the appeal in this case the stock was sold by consent of parties; but at the time of the second trial it was shown to be worth twelve per cent. more; but it was held that as the owner had consented to the sale the bank was only chargeable with the amount for which the stock was sold. Merchants' Bank v. Livingston, 17 Hun 321.

to presume that he has authorized his broker to pledge the stock for his own debt. It is wholly immaterial that the name of the real owner was not disclosed. The stock is held in trust for him as much as it would be had his name been given.[1] Of course, when there is nothing upon a certificate of stock, or upon the company's record of it, to indicate a trust on the part of the holder, one dealing with him in relation to the stock, without reason to know that it is held in trust, is not affected by a secret, undisclosed trust.[2]

A memorandum of "Framingham and Lowell Railroad bonds as collateral," on a joint and several note, signed by one as principal and by others as sureties, is not notice to the payee that the bonds mentioned should accompany the note for the protection of the sureties. The payee is under no obligation in consequence of the memorandum to take care of the interests of the sureties by refusing to lend money on the note, and a different security from that named; and does not lose any rights against them by taking notes of the railroad company, instead of its bonds, as collateral.[3]

§ 494a. **A broker who buys stocks on the order of a banker who acts for an undisclosed customer, must hold them for the customer upon receiving timely notice.** Thus if a customer orders his banker to buy certain shares of stock for him, and the banker, without disclosing the name of his customer, thereupon instructs a stockbroker, who is his correspondent and with whom he has an account, to buy the stock on his account, and the broker buys the stock accordingly, and the banker, instead of forwarding the money, allows the amount paid for the stock to be charged against him, and the stock to remain with the broker as collateral security for any balance that may be owing on his general account, the banker becomes the owner, and the broker the pledgee in possession, of the stock, and if the banker then notifies his customer that the

[1] Fisher v. Brown, 104 Mass. 259, 6 Am. Dec. 235.

[2] Martin v. Sedgwick, 9 Beav. 333; Dodds v. Hills, 2 Hem. & Mil. 424.

[3] Fitchburg Sav. Bank v. Rice, 124 Mass. 72.

stock has been bought, as ordered, the banker's title to the stock thereby passes to the customer subject (where the customer has a balance to his credit with the banker sufficient to pay for the stock) only to the lien of the broker, and can not thereafter pass by the banker's assignment in insolvency to his assignee. In such a case, the banker's customer, on notifying the broker of his ownership of the stock, is entitled to have timely notice of any sale thereof, and to have other stocks or securities in the broker's hands belonging to the banker first sold and applied on the banker's indebtedness; and if any balance from the sale of the customer's stock is turned over by the broker to the assignee in insolvency of the banker, the customer may recover the amount thereof from the broker.[1]

§ 494b. **Where a pledgee of a stock certificate has repledged it in such form that the second pledgee is charged with notice** that the first pledgee had no authority to pledge it, the pledgor may pay or tender his debt to his pledgee, and need not make any tender or payment to the second pledgee with notice. The second pledgee, taking the stock with notice that the pledgor would be entitled to a return of the stock upon the discharge of his obligation, must restore the stock to the pledgor upon the tender or payment of that obligation.[2] In Talty v. Trust Co.,[3] Swayne, J., said: "A tender to the second pledgee of the amount due from the first pledgor to the first pledgee extinguishes, *ipso facto*, the title of the second pledgee;" and, citing from Story on Bailments, the learned judge, in the same opinion, lays down this rule: "If the pawnee should undertake to pledge the property [not being negotiable securities] for a debt beyond his own, or to make a transfer thereof as if he were the actual owner, it is clear that in such case he would

[1] Le Marchant v. Moore, 150 N. Y. 209, 44 N. E. Rep. 77, affirming 79 Hun 352, 29 N. Y. Supp. 484.

[2] German Sav. Bank v. Renshaw, 78 Md. 475, 28 Atl. Rep. 281; Griggs v. Day, 21 N. Y. App. Div. 442, 47 N. Y. Supp. 609, 136 N. Y. 152, 162, 32 N. E. Rep. 612; Donald v. Suckling, L. R. 1 Q. B. 585, 618; Johnson v. Stear, 15 C. B. (N. S.) 330, and Talty v. Freedman's Sav. & Trust Co., 93 U. S. 321.

[3] 93 U. S. 321.

be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee." In German Bank v. Renshaw,[1] the court said: "When the amount due from the first pledgor to the first pledgee is not discharged, the condition upon which the former is entitled to the return of his property has not been complied with. These cases decide that under such circumstances this condition may be met by a tender to the repledgee; and the necessity for this follows from the fact that the right of the original pledgor to have back his property can only arise upon the discharge of the indebtedness on account of which the pledge was made."

§ 494c. **Notice by advertisement of the theft of negotiable bonds or of stock indorsed in blank is not sufficient to defeat the title of a pledgee** after the lapse of some years. Thus, where negotiable municipal bonds were stolen, and notice of loss was given by advertisement, they were eighteen years afterwards taken by a bank as a collateral for a loan. The borrower's account with the bank stood in his name as trustee, and the loan was so made to him; and he had been previously convicted of crime, and served a sentence therefor. It was held, that such facts were insufficient to defeat the bank's title to the bonds, because constituting notice of, or putting it on inquiry as to, the ownership of the bonds, where the borrower's account with the bank was opened as trustee, and with commissions earned by him in a sale of stocks through the bank's agency, the bonds containing nothing to show a trust relation, and no knowledge was shown of such conviction and sentence, which occurred five years before, and between which and the bond transactions such borrower had numerous dealings with the bank, presenting and discounting papers of a firm having large capital and credit, of which his brother was a member, which was promptly cared for, and doing the usual business of a customer of the bank in the usual manner.[2]

The question of notice to a pledgee of defects in the pledgor's

[1] 78 Md. 475, 28 Atl. Rep. 281.

[2] Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 65 N. Y. Supp. 757.

title was passed upon by the supreme court of Canada in a recent case which is of interest in this connection although the subject of the pledge was bonds transferable by delivery. The bonds in question, which belonged to the estate of a deceased person, had been used in a hearing and marked as exhibits in the case, but were afterwards lost and were advertised for in a newspaper. About ten years afterwards a person who was the agent and administrator of the estate, and had the bonds in his possession as such, pledged them to a broker for advances on his own personal account. In a suit by parties beneficially interested in the estate against the broker, it was held that neither the advertisement, nor the marks upon the bonds, nor the broker's knowledge of the agent's insolvency, were notice to the pledgee of defects in the pledgor's title.[1]

IV. *His Rights as Broker Carrying Stocks upon Margin.*

§ 495. **The carrying of stock by a broker for a customer upon a margin** creates the relation of pledgor and pledgee between the parties, unless there be some express agreement between the parties which would constitute the transaction a mortgage.[2] The stock purchased is the property of the customer, and is in effect pledged to the broker as security for the payment of the advances made by him in the purchase of the stock. Therefore a sale of the stock by the broker at the broker's board, without notice, upon the failure of the customer to keep the margin good, is a conversion of the stock;

[1] Young v. MacNider, 25 Canada Supreme Ct. Rep. 272.

[2] Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80; Stenton v. Jerome, 54 N. Y. 480; Vaupell v. Woodward, 2 Sandf. Ch. (N. Y.) 143; McNeil v. Tenth Nat. Bank, 55 Barb. (N. Y.) 59, overruled on other points in 46 N. Y. 325, 7 Am. Rep. 341; Brass v. Worth, 40 Barb. (N. Y.) 648; Clarke v. Meigs, 22 How. Pr. (N. Y.) 340; Morgan v. Jaudon, 40 How. Pr. (N. Y.) 366; Read v. Lambert, 10 Abb. Pr. (N. Y.) N. S. 428; Gillett v. Whiting, 120 N. Y. 402, 24 N. E. Rep. 790; Colt v. Owens, 90 N. Y. 368; Thompson v. Toland, 48 Cal. 99; Worthington v. Tormey, 34 Md. 182; Hatch v. Douglas, 48 Conn. 116, 12 Rep. 744, 40 Am. Rep. 154.

and evidence of a usage that stocks so held might be sold in this manner is inadmissible.[1] Thus, if a stock-broker undertakes to buy certain stock for a customer, the latter advancing ten per cent. of the market value, and agreeing to keep good such proportionate advance according to the fluctuations of the market, the result of the agreement, as stated by Chief Justice Hunt,[2] is as follows: "The broker undertakes and agrees: 1. At once to buy for the customer the stocks indicated; 2. To advance all the money required for the purchase, beyond the ten per cent. furnished by the customer; 3. To carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent. is kept good, or until notice is given by either party that the transaction must be closed,—an appreciation in the value of the stocks is the gain of the customer, and not of the broker; 4. At all times to have in his name, or under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock; 5. To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or, 6. To sell such shares upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract the customer undertakes: 1. To pay a margin of ten per cent. on the current market value of the shares; 2. To keep good such margin according to the fluctuations of the market; 3. To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker."

In the absence of any express contract or any custom or usage in relation thereto, a broker employed to purchase pork and lard on the board of trade upon a margin has no right to sell or close out the contracts made for the customer before

[1] Markham v. Jaudon, 41 N. Y. 235, overruling Sterling v. Jaudon, 48 Barb. (N. Y.) 459; Hanks v. Drake, 49 Barb. (N. Y.) 186.

[2] In Markham v. Jaudon, 41 N. Y. 235.

their maturity unless the customer so directs, or unless he fails to keep his margins good, and in case he does so the customer can recover back of the broker the money deposited as margins, and the loss, if any, occasioned by the closing out of such contracts.[1]

§ 496. **The broker acts in a threefold relation:** first, in purchasing the stock he is an agent; then, in advancing money for the purchase, he becomes a creditor; and, finally, in holding the stock to secure the advances made, he becomes a pledgee of it. It does not matter that the actual possession of the stock was never in the customer. The form of a delivery of the stock to the customer, and a redelivery by him to the broker, would have constituted a strict, formal pledge. But this delivery and redelivery would leave the parties in precisely the same situation they are in when, waiving this formality, the broker retains the certificates as security for the advance. The contract is in spirit and effect, if not technically and in form, a contract of pledge, and is governed by the law of pledges.[2]

In Stenton v. Jerome,[3] the effect of a contract for the purchase of stock upon a margin was carefully considered by the New York Court of Appeals. The agreement between a firm of stock-brokers and their customer provided that the latter should furnish a specified margin as security, and keep the same good whenever called upon to do so; and in the event of non-compliance with such demand, the brokers were authorized to close the account without notice, by purchase or sale, at public or private sale, or at the brokers' board, or otherwise. In an action against the brokers by the customer for a

[1] Denton v. Jackson, 106 Ill. 433.

[2] Per Hunt, C. J., in Markham v. Jaudon, 41 N. Y. 235. See, however, dissenting opinions of Grover and Woodruff, JJ.; Morgan v. Jaudon, 40 How. Pr. (N. Y.) 366.

[3] 54 N. Y. 480, approved in Baker v. Drake, 66 N. Y. 518. Expressions not in accord with these cases, in Hanks v. Drake, 49 Barb. (N. Y.) 186; Sterling v. Jaudon, 48 Barb. (N. Y.) 459, and Schepeler v. Eisner, 3 Daly (N. Y.) 11, affirmed 54 N. Y. 675, can not be considered law; and, in fact, are overruled in Markham v. Jaudon, 41 N. Y. 235.

sale of stock without making demand for more margin, or for payment, the court[1] say: "Under the agreement the defendants were not obliged to carry the stocks indefinitely. Whenever they desired to close the transaction in reference to any stocks, it was their duty to tender the certificates thereof to the plaintiff, and demand payment for them; then, if within a reasonable time he did not take and pay for the stocks, they had a right to sell them to satisfy their lien, after first giving her notice of the time and place of sale. There was only one contingency in which they could, under the agreement, sell the stock without notice, and that was, if the plaintiff's margin fell below twenty per cent. and she failed, upon demand, to make the margin good; then, by the express stipulation in the agreement, they could sell without notice. Here no demand was made for more margin, and hence there was no right to sell on account of the insufficiency of the margin; and there was no tender of the stock, and no demand that the plaintiff should pay for the same; and hence the defendants had no right to sell for the purpose of closing their accounts with her. The sale of the stocks was, therefore, wrongful and unauthorized, and rendered the defendants liable to the plaintiff for such damage as the rules of law entitled her to."

§ 497. **There is a distinction between the carrying of stocks upon a margin and a like carrying of executory contracts** for the future delivery of grain or other like property; and the ground of the distinction is, that while a broker may well be considered a pledgee of the stocks which he has purchased for his customer, because he has actual possession of them, the holder of an executory contract for the delivery of grain can not be so considered, because he has neither the actual possession of the grain nor the constructive possession of it, by means of a warehouse receipt or bill of lading. Therefore, it is held that if a commission merchant or broker contracts in his own name for the purchase of grain for a customer, to be delivered at a future

[1] Per Earle, C. J.

time, the latter making an advance on the purchase, and agreeing to keep the margin good up to the time of delivery, the relation of pledgor and pledgee is not created, so as to require a notice of the time and place of sale of the grain, on the customer's failure to keep up the margins.[1]

§ 498. **A different view of the contract of a stock-broker and his customer in such case** is taken by the supreme court of Massachusetts in a recent decision.[2] The contract is not regarded as creating the relation of pledgor and pledgee between the parties, but as being merely an executory agreement, under which the broker may, upon the default of the customer, sell the stock without notice. In the case before the court a stock-broker had purchased certain shares of stock for a customer, under an agreement to carry the stock for him upon the payment of a certain "margin," which the customer was to keep good. The stock having declined, the broker requested the customer to make his margin good; and the latter failing to do so, the broker, after a few days, sold the stock at the brokers' board in New York, at the market price, without notice. The sale left the customer indebted to the broker, but the latter made no demand for the payment of the balance due him till some four months afterwards, when, the stock having risen in price above that originally paid for it, the customer demanded the stock, and offered to pay the balance of the purchase money and interest. In a suit by the customer against the broker for the value of the stock the trial court held that he was entitled to recover, upon the ground that the relation of the parties was that of pledgor and pledgee, and that the usage of brokers, which was proved, to sell stock so held at the brokers' board, as soon as the margin is exhausted, without notice, was illegal. Exceptions to these rulings were sustained by the supreme court. Mr. Justice Devens, delivering the opinion, said: "The relation of the parties existed by force of a mutual and dependent contract, by which the de-

[1] Corbett v. Underwood, 83 Ill. 324, 25 Am. Rep. 392.

[2] Covell v. Loud, 135 Mass. 41, 16 Cent. L. J. 471, 46 Am. Rep. 446.

fendants agreed to purchase, and hold or convey, for the plaintiff, a certain number of shares of stock, the plaintiff paying a certain sum of money at the time, and agreeing to pay interest on the sums advanced by the defendants, and, in case the stock depreciated, to make what is termed 'a margin' of ten dollars per share in the cost of the market price of the stock, as that might change from time to time. When the plaintiff failed to perform his part of the contract, by making the necessary advances upon demand, the stock having rapidly depreciated in value, he has no ground of complaint that the defendants ceased to hold and carry it for him, and thereafter disposed of it.

"We are aware that transactions of this nature have been held sometimes to make the broker an agent who purchases the stock as such agent for the customer, and who holds it thereafter as a pledgee for the money advanced for its purchase. But in Wood v. Hays,[1] it was held that a broker who advanced money to buy stock for another, and held it in his own name, might, so long as he had not been paid or tendered the amount of his advances, pledge it as security for his own debt to a third person, without making himself liable to an action by

[1] 15 Gray (Mass.) 375. There seems to be nothing in this case to show that the contract between the broker and the customer was not regarded by the court as a pledge. The statement of facts clearly made it such; for it appeared that the broker bought the stocks, and that afterwards the parties settled an account, and found a certain balance due from the customer to the broker, for which the customer gave his promissory note, and, as security for its payment, the broker acknowledged that he held certain shares of stock. The statement by the court that the contract was strictly conditional, to deliver so many shares on payment of so much money, is not inconsistent with this view. The pledgee's contract is always conditional, to deliver the pledge on the payment, or tender of payment, of the debt secured. The return of the pledge can not be asked for, except upon the condition of payment of the debt secured. A sale or pledge of the property by the pledgee does not amount to a conversion by him, unless the pledgor tenders payment of the debt and demands the return of the property. In this case before the court the debt was neither paid nor tendered. The customer, therefore, had no right of action against the broker. Besides, on general principles governing the contract of pledge, the broker had the right to pledge the stock for a debt of his own, to the extent of his advances upon it. See §§ 331, 418-423.

his employer; and this upon the ground that the contract was conditional to deliver the shares upon the payment of the money. It can not make any difference that, in this case, a small portion of the money necessary for the original purchase was advanced by the customer."

§ 499. **This decision introduces a new doctrine** as regards the relation of a stock-broker and customer, which has heretofore always been regarded as that of pledgor and pledgee. And such, in fact, is the relation, in all ordinary cases where the broker has purchased stocks for a customer, and carries them for him upon the payment of a portion of the purchase-money. The broker holds the stock as collateral security for the remainder of the purchase-money, and should be subject to the established rules of law governing the contract of pledge. The case is wholly different from that where a broker simply makes a contract with another for the future delivery of grain, which is not delivered into the broker's actual possession. In the latter case there is no pledge, for no property of the customer is delivered to the broker. This distinction was pointed out in the Illinois case, in which it was decided that a broker holding for a customer an executory contract for the future delivery of corn which never came into his possession did not stand in the relation of a pledgee of his customer. The court in that case say that if the corn purchased had been delivered to the broker, and he had paid for the same, and held the possession of it as security for the money advanced, then it might, with propriety, be claimed that the relation of pledgor and pledgee existed, and that notice of the time and place of sale should be given.[1]

§ 500. **But a broker can not recover for a purchase which is fictitious,** or which he has charged to his customer at an enhanced price. In such case he fails to perform the contract of purchase.[2] A usage of brokers that one, on receipt of an

[1] § 497; Corbett v. Underwood, 83 Ill. 324, 327, 25 Am. Rep. 392.

[2] Commonwealth v. Cooper, 130 Mass. 285; Farnsworth v. Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756.

order to buy stocks on a margin, may assume the contract himself, instead of making it with a third person, is illegal. The broker has no right to put himself in a position antagonistic to the interests of his employer. He can not make himself both buyer and seller. A broker purchased for a customer certain United States bonds, under an agreement that the broker should advance the purchase-price and should carry the original bonds purchased at a specified rate of interest. In the purchase the broker overcharged for a part of the bonds, and for another part charged a commission for buying and received a commission for selling. Before the maturity of the loan the broker sold the bonds without the knowledge of the customer. The latter made a payment on account of the supposed loan. At the maturity of the loan the broker demanded payment of the customer, and notified him that in case of default he would be sold out. Payment was not made, and the broker thereupon sold other bonds of a like amount. In an action by the customer to recover the money he had paid on this transaction, the broker set up a counter claim for a deficiency arising on such sale. It was held that the counter claim was properly rejected; that substantial performance of his contract was a condition precedent to the broker's right of recovery, while in essential elements he had not performed it.[1]

[1] Levy v. Loeb, 85 N.Y. 365. Mr. Justice Finch, delivering the opinion of the court, said: "The contract was not merely for the loan of so much money. That was but a single element in an entire and much broader agreement. The defendants were to buy the bonds as agents of the plaintiffs. They were to make the purchase in that capacity, with the skill and ability which their business and experience indicated, and in entire good faith to their clients, without any adverse or hostile interest; and the identical bonds thus bought they agreed to carry, advancing the money for that purpose, and holding the bonds as collateral. That contract was not performed by the defendants in any of its essential elements. They did not buy for their clients in good faith as agents, but on the contrary, buying without disclosing their agency, sought to transfer the bonds to the plaintiffs at a larger price, concealing the profit intended to be realized. They broke their contract by taking commissions from both sides. They broke it again by not carrying the original bonds as agreed, and the deficiency upon which they rely sprang from a sale of their own bonds and not plaintiffs'. Not only was there thus a total failure to perform

In a subsequent suit by the customer against the broker to recover the moneys he had paid in this transaction, it was held that upon obtaining knowledge of the facts he was entitled to repudiate the purchase and to recover back the moneys paid.[1]

§ 500a. **One pledging securities to a stock-broker under a wagering contract as to the purchase and salè of stocks** or of commodities is entitled to recover from him the value of the securities lost in such transactions. A statute in Massachusetts[2] provides that: "Whoever contracts to buy or sell upon credit or upon margin any securities or commodities, having at the time of contract no intention to perform the same by the actual receipt or delivery of the securities or commodities, and payment of the price, or whoever employs another so to buy and sell on his behalf, may sue for and recover in an action of contract from the other party to the contract, or from the person so employed, any payment made or the value of anything

on the part of defendants, but it is entirely possible that the sale which they did make of the original bonds, brought their full cost and left no deficiency. The defendants choose not to disclose either the date or terms of that sale. Doing so they can not sell their own bonds at a sacrifice and claim that deficiency of the plaintiffs. The rule might be otherwise if the defendants had not specially agreed to carry the original bonds. It is that fact, as found by the trial judge, which is fatal to the counter claim alleged. The agreements were mutual and the acts to be done concurrent. Since no directions to sell the bonds were given by plaintiffs upon the expiration of the contract by the lapse of the stipulated time, it was the duty of the defendants to deliver the original bonds which had been carried at the price actually and in truth paid for them, and the duty concurrently of plaintiffs to pay that price with the interest. The defendants, therefore, could not put the plaintiffs in default without a tender of performance or at least proof of a readiness and willingness to perform. No such proof was given. No bonds were tendered. The original bonds could not be, since the brokers had sold them by their own unauthorized act and rendered their delivery impossible. They did not even offer similar bonds at the price actually paid, but demanded a greater one. There was no element of performance or readiness to perform in the case. Not a single stipulation of the contract was fairly and in good faith fulfilled, and no valid counter claim was established."

[1] Levy v. Loeb, 89 N. Y. 386, 15 N. Y. Weekly Dig. 176, reversing 15 J. & S. 61.

[2] Stats. 1890, c. 437.

delivered: provided, such other party or other person so employed had reasonable cause to believe that no intention to actually perform existed." At the trial of an action under this statute relative to wagering contracts in securities and commodities, to recover the value of stock deposited with the defendant, a broker, as collateral security on account of the agent of the plaintiff, who, as such agent, bought and sold stock on margin, with no intention on the part of either himself or the plaintiff of performing the contract of purchase or sale by the actual receipt or delivery of the stock, the judge properly ruled that the plaintiff would be entitled to recover, if he proved that neither he nor his agent intended to perform the contract by the actual receipt and delivery of the stock and the payment of the price, and that the defendant had reasonable cause to believe that no intention to actually perform existed; but that he could not recover unless he proved both these facts, nor if either he or his agent intended such performance to be made by either of them, or by the defendant as the agent of either of them: and that if the plaintiff was entitled to recover, the measure of damage would be the value of the stock when demand for it was made.[1]

In Irwin v. Williar,[2] the supreme court of the United States says of wagering contracts: "In England, it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only nonenforceable, Thacker v. Hardy,[3] while generally, in this coun-

[1] Davy v. Bangs, 174 Mass. 238, 243, 54 N. E. Rep. 536; Lyons v. Coe, (Mass. 1901), Banker & Tradesman for Jan. 23, 1901; Northrup v. Buffington, 171 Mass. 468, 51 N. E. Rep. 7. See, also, Barnes v. Smith, 159 Mass. 344, 34 N. E. Rep. 403; Harvey v. Merrill, 150 Mass. 1, 10, 22 N. E. Rep. 49; Wakefield v. Farnum, 170 Mass. 422, 49 N. E. Rep. 640; Embrey v. Jemison, 131 U. S. 336, 9 S. C. Rep. 776; Irwin v. Williar, 110 U. S. 499, 510, 4 S. C. Rep. 160; Cothran v. Ellis, 125 Ill. 496, 16 N. E. Rep. 646; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; First National Bank v. Oskaloosa Packing Co., 66 Iowa 41, 23 N. W. Rep. 255; Rumsey v. Berry, 65 Me. 570; Crawford v. Spencer, 92 Mo. 498, 4 S. W. Rep. 713; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. Rep. 203; Fareira v. Gabell, 89 Pa. St. 89; Lowry v. Dillman, 59 Wis. 197, 18 N. W. Rep. 4.

[2] 110 U. S. 499, 510, 4 S. C. Rep. 160.

[3] 4 Q. B. D. 685.

try, all wagering contracts are held to be illegal and void as against public policy.'"[1]

V. *His Right to Use and Hypothecate Pledged Stock.*

§ 501. **Authority to use collateral stock.**—In the absence of an agreement on the part of the pledgor, either express or implied, the pledgee has no right to use a thing held in pledge. It is not a common law right.[2] A general authority to a creditor holding corporate stock as collateral security "to use, transfer, or hypothecate the same," at his option, he being required, on payment or tender of the amount of the loan, to return an equal quantity of the stock, but not the specific stock deposited, authorizes the pledgee to sell it for his own benefit before maturity; and such a sale is not a conversion of the stock for which an action will lie.[3] The object of such a clause is to enable the creditor, if he finds it inconvenient to carry the loan, to obtain the money upon the stock, by sale or otherwise. It was doubtless an inducement to him to make the loan. In selling the stock, by virtue of the contract, he simply took upon himself the burden of returning to the debtor, upon demand, when the loan should be made, the same quantity of stock.

One borrowed money of a broker, pledging shares of stock under such a contract allowing the pledgee to hypothecate the stock, and at the maturity of the loan paid the debt, the broker saying the certificate was at a bank, and that he would return it to the pledgor immediately. The broker had pledged the

[1] Citing Dickson v. Thomas, 97 Pa. St. 278; Gregory v. Wendell, 40 Mich. 432; Lyon v. Culbertson, 83 Ill. 33; Melchert v. American Union Telegraph Co., 3 McCrary 521, 11 Fed. Rep. 193, and note; Barnard v. Backhaus, 52 Wis. 593, 6 N. W. Rep. 252, 9 N. W. Rep. 595; Kingsbury v. Kirwan, 77 N. Y. 612; Story v. Saloman, 71 N. Y. 420; Love v. Harvey, 114 Mass. 80.

[2] Lawrence v. Maxwell, 53 N. Y. 19; Skiff v. Stoddard, 63 Conn. 198, 218, 26 Atl. Rep. 874, 28 Atl. Rep. 104.

[3] Ogden v. Lathrop, 65 N. Y. 158, reversing 1 Sweeny 643, 3 J. & S. 73, where it was thought that the power "to use," etc., did not authorize a sale.

stock to a bank the same day he received it from the customer and it was still held by the bank on the broker's pledge when the customer paid his debt. The broker two days after the customer paid his debt and demanded the return of his stock, filed his petition in insolvency and secured his discharge, the customer proving his claim for the stock, which the bank had sold. In a suit by the customer against the broker to recover the money paid, or for a conversion of the stock, it was held that the broker had acted within his authority in hypothecating the stock, that his pledge of the stock was not fraudulent and that the plaintiff's claim was barred by the discharge in insolvency.[1]

§ 502. **Authority in the pledgee of stock to hypothecate it for his own debts may be inferred from the circumstances of the transaction,** and the course of dealing between the parties. Thus, a broker having bought gold for a customer, upon his agreement to furnish a margin of ten per cent. for the accommodation of the latter, accepted certain stock instead of money; and an intent that the broker should use the stock as he might have used the money was inferred.[2] In a conflict of testimony as to the broker's authority to use the stock, it is within the province of the jury to decide what the contract between the parties was; and evidence may be given to show that, in previous transactions between the parties, the broker had, with the knowledge of the customer and without objection on his part, hypothecated stock deposited for a margin.[3]

Parol evidence of an agreement, made at the time of a pledge of stock of a corporation, that the pledgee might use the stock, is inadmissible when the pledgee has given a receipt for the stock, stating that he holds it as collateral security, and providing that he may sell "on one day's notice." The tendency

[1] Wilson v. Hawley, 158 Mass. 250, 33 N. E. Rep. 522.

[2] Lawrence v. Maxwell, 58 Barb. (N. Y.) 511, 6 Lans. 469, 53 N. Y. 19, 64 Barb. 102; Hope v. Lawrence, 1 Hun (N. Y.) 317; Chamberlain v. Greenleaf, 4 Abb. (N. C.) 178.

[3] Lawrence v. Maxwell, 58 Barb. (N. Y.) 511.

of such evidence would be to show that the contract made when the stock was pledged was different from that set forth in writing at the time.[1]

§ 503. **A general custom that a broker may pledge his customer's stock for the purpose of raising money to carry it, is** valid,[2] if such custom is known to and acquiesced in by the customer. It is not unreasonable that a broker who is carrying stock for a customer upon a margin, or small payment by him, should have the right to use the stock by way of pledging it for the purpose of enabling him to carry the stock for the customer. Probably this is the general custom in such transactions, and a knowledge of such custom would be imputed to one who purchases stock of a broker to be carried in this manner.

Authority in the pledgee to sell stock held in pledge is inconsistent with the contract of pledge, and a custom or usage for a broker holding stock in pledge to sell it will not avail to vary the terms of the implied agreement.[3] The contract of pledge recognizes the general property of the bailor and his right to redeem and have the thing pledged. A custom or usage for a pledgee to sell the thing pledged is not consistent with the contract because such sale would put it out of his

[1] Fay v. Gray, 124 Mass. 500.

[2] Vanhorn v. Gilbough, 21 Am. Law Reg. N. S. 171. The referee, whose conclusions were adopted by the supreme court, said: "I can perceive no real objection to the validity of a general usage that a broker may use his customer's stock as collateral to carry it for the customer. Such usage contravenes no statute or principle of public policy. The customer can, of course, avoid all trouble in this respect by paying for his stock in full; but where, as here, he only pays a small percentage of its value, while his agent, the broker, must provide for the balance, it would not seem unreasonable that the broker should for that purpose pledge it as collateral." As to the effect of stock exchange usages in general, see note to above case by Francis A. Lewis, Jr., Esq., pp. 176-181.

[3] Lawrence v. Maxwell, 53 N. Y. 19; German Savings Bank v. Renshaw, 78 Md. 475, 28 Atl. Rep. 281; First Nat. Bank v. Taliaferro, 72 Md. 164, 171, 19 Atl. Rep. 364; Rich v. Boyce, 39 Md. 314; Kraft v. Fancher, 44 Md. 204, 215; Fay v. Gray, 124 Mass. 500; Oregon & Transcontinental Co. v. Hilmers, 20 Fed. Rep. 717.

power to return it to the pledgor upon payment of the debt secured.

§ 504. **But if a broker pledges his principal's stock to a bank for a specific loan, and the bank is informed of the ownership of the stock,** and of the purpose for which it is obtained, the stock is not subject to a general banker's lien for moneys subsequently borrowed by the brokers from the bank. A tender by the owner of the stock, made with a view to settling the matter without suit, the bank claiming a lien upon the stock for subsequent loans, is not conclusive upon him or his assignee as an admission that the bank had a lien on the stock for the amount so tendered.[1]

A bank making a loan to a broker on corporate stock as collateral security, with knowledge that the ownership of the stock is not in the broker, is bound to make inquiry whether the broker had authority to pledge the stock, and if he had no such authority, the owner may recover the stock from the bank.[2]

The more difficult question in such case is what facts are sufficient to charge the bank with knowledge that the person pledging the stock to the bank has no authority to make the pledge. It has been held that where the original pledgor indorsed to his broker as security for other stock to be purchased on margins, certain certificates of stock without filling in the names of the assignor or assignee or the date of transfer, and the broker repledged them to a bank for a loan made to himself, the bank was put upon inquiry as to the right of the broker to pledge the certificates for his own debt, and therefore acquired no better title than the broker had, and was bound to restore the certificates to the original pledgor upon his paying the debt for which he pledged them to his broker.[3]

[1] Talmadge v. Third Nat. Bank, 91 N. Y. 531, 16 N. Y. Weekly Dig. 487.

[2] Westinghouse v. German Nat. Bank, 188 Pa. St. 630, 41 Atl. Rep. 734, 43 W. N. C. 349.

[3] German Savings Bank v. Renshaw, 78 Md. 475, 28 Atl. Rep. 281; First Nat. Bank v. Taliaferro, 72 Md. 169, 19 Atl. Rep. 364; Taliaferro v. First Nat. Bank, 71 Md. 209, 17 Atl. Rep. 1036.

Signature in blank of the assignment and power of attorney to bargain, sell, and transfer, on the back of stock certificates delivered as a pledge, has been held to be notice to third persons of the pledgee's lack of authority to repledge them for his own debt.[1]

§ 505. **The use which the pledgee may make of the property pledged must be consistent with the general ownership of the pledgor,** and consistent with his ultimate right to redeem. The right to use the pledge ceases the instant the debt is paid or tendered, and the creditor must at his peril be in condition to restore the property to the debtor.[2] "Conceding the right to use the stock pledged, by way of hypothecation or otherwise, as claimed, and that it was at the time of the tender and demand lawfully out of the actual possession of the defendant, it was his duty at once to regain the possession and restore the same to the plaintiff. A neglect or refusal to do so gave to the plaintiff an action as for a conversion of the property. It is immaterial whether the stock was hypothecated by the defendant upon a loan of money for the benefit of plaintiff's transactions or for his own purposes. In either case the duty and the obligation were the same. The defendant conceded his inability to redeem the stock from his pledge or hypothecation, so that it was lost to the plaintiff by the act of the defendant, which was not a use consistent with a pledge, or the legal rights of the pledgor. It was not a mere temporary use of the pledge. No use of a pledge which could be authorized consistent with such a bailment could justify such a dealing with it as to destroy the property or deprive the general owner of his property in it. If the pledgee may use the thing pledged he must do so at his peril, and so use it as not to affect the ultimate right and ability of the pledgor to have it again when the lien shall be discharged. It follows that upon the undisputed facts in this case the evidence offered and rejected was wholly imma-

[1] German Savings Bank v. Renshaw, 78 Md. 475, 28 Atl. Rep. 281, following Taliaferro v. First National Bank, 71 Md. 209, 17 Atl. Rep. 1036.

[2] Lawrence v. Maxwell, 53 N. Y. 19; German Savings Bank v. Renshaw, 78 Md. 475, 488, 28 Atl. Rep. 281, quoting text.

terial, for at the time of the demand and the refusal to deliver the stock pledged, the lien of the defendant was discharged, the relation of pledgor and pledgee had ceased to exist, and the right of the defendant further or longer to use or detain the stock was gone."[1]

§ 506. **If, however, there is an agreement or understanding that a broker may hypothecate stocks** which he is carrying for a customer upon a margin, according to the usual course of business, such use of them does not of itself amount to a conversion of them.[2]

§ 507. **The pledgor may treat as a conversion a transfer of a certificate of stock as collateral security by the pledgee to a creditor of his own** in the absence of specific authority;[3] and the fact that the pledgee had a greater number of shares standing to his credit on the books of the company at all times during the transaction is immaterial. The pledgor may recover the market value of the stock at the time of the conversion.[4] When the very certificates pledged are transferred by the pledgee to his own creditor there is an identification of the shares, so that there is no room for the presumption that any shares the pledgee had on hand during the continuance of the pledge were the shares deposited with him in pledge.[5] Where a pledgee had an option to purchase the stock pledged at a specified price, it was held that the pledgor might consider his obtaining a cancellation of the certificate pledged

[1] Lawrence v. Maxwell, 53 N. Y. 19, 23, per Allen, J.

[2] Chamberlain v. Greenleaf, 4 Abb. N. C. (N. Y.) 178; Chouteau v. Allen, 70 Mo. 290. See § 503.

[3] Van Voorhis v. Rea, 153 Pa. St. 19, 25 Atl. Rep. 800; Skiff v. Stoddard, 63 Conn. 198, 26 Atl. Rep. 874, 28 Atl. Rep. 104.

[4] Fay v. Gray, 124 Mass. 500; Allen v. Dubois, 117 Mich. 115, 75 N. W. Rep. 443; Morton v. Preston, 18 Mich. 60, 100 Am. Dec. 146; Upham v. Barbour, 65 Minn. 364, 68 N. W. Rep. 42; Hubbell v. Blandy, 87 Mich. 209, 49 N. W. Rep. 502. See Langton v. Waite, L. R. 6 Eq. 165, 18 L. T. N. S. 80; France v. Clark, 22 Ch. D. 830. See, however, § 508.

[5] Allen v. Dubois, 117 Mich. 115, 75 N. W. Rep. 443.

and an issue of the stock to a third party as an exercise of the option, and might sue to recover the price.[1]

If, however, a pledgee transfer the collateral stock in such a way that he retains control of it and is able to deliver it at once whenever the pledgor should call for it, there is no conversion of it. Such was the case where the pledgee assigned the collateral stock to third persons, in order not to injure his credit by appearing to own too much of it, taking back from the transferees assignments in blank, so that the stock remained actually in his control and ready for delivery to the owner. The pledgor's rights were not violated or injuriously affected.[2]

And such also was the case where a pledgee of corporate shares transferred them to another person to hold for him in order to protect himself against personal liability. There was no real conversion of the stock by the pledgee because by such transfer he did not apply it to his own use. He did not exercise any dominion over it in defiance of the rights of the owner. He put it into the hands of a third person to hold for him, in order that what was intended for a security might not be a burden. The stock remained under his control.[3]

§ 508. **Return of identical stock.** A broker carrying stock upon a margin, according to the usual custom, is not bound to keep the stock separate from other stock of the same kind owned by himself, but only to keep in possession and ready for delivery on demand an amount of stock equal to that purchased.[4] Ordinarily, a pledgor of personal property is entitled

[1] Upham v. Barbour, 65 Minn. 364, 68 N. W. Rep. 42.

[2] Day v. Holmes, 103 Mass. 306; Fay v. Gray, 124 Mass. 500; Terry v. Birmingham Nat. Bank, 93 Ala. 599, 9 So. Rep. 299.

[3] Heath v. Griswold, 5 Fed. Rep. 573.

[4] Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311; Nourse v. Prime, 4 Johns. Ch. (N.Y.) 490, 8 Am. Dec. 606, 7 Johns.Ch 69, 11 Am. Dec. 403; Gruman v. Smith, 81 N.Y. 25, 9 Rep. 748; Levy v. Loeb, 15 J. & S. 61, 6 Duer 56, 85 N. Y. 365; Thompson v. Toland, 48 Cal. 99; Allen v. Dykers, 3 Hill 593; Hardy v. Jaudon, 1 Robt. (N. Y.) 261; Gilpin v. Howell, 5 Pa. St. 41, 45 Am. Dec. 720; Stewart v. Drake, 46 N. Y. 449, per Allen, J.; Worthington v. Tormey, 34 Md. 182; Chamberlain v. Greenleaf, 4 Abb. N. C. (N. Y.) 178; Genin

to have the specific property pledged returned to him upon payment of the debt, and can not be compelled to accept other property of the same kind and equal value in place of it; but shares in a corporation stand upon a different footing, because one share represents the same interest in the business of the corporation that another does, and, all the shares being of equal value, there can be no reason for preferring one from another, or for distinguishing one from another.[1] The reasons for this distinction are obvious. Two visible, tangible chattels, though apparently precisely similar, may yet, in fact, be of different values. Moreover, the owner of a specific article of personal property may attach a peculiar value to it beyond the value of other articles of a precisely similar kind; and, having pledged it, he can not be compelled to take back any other article of the same kind and equal value, in lieu of that which was converted.[2]

The rule in regard to the return of the identical stock pledged has recently been stated by the supreme court of

v. Isaacson, 6 N. Y. Leg. Obs. 213; Salters v. Genin, 7 Abb. Pr. (N. Y.) 193, 3 Bosw. 250; Taussig v. Hart, 58 N. Y. 425, 49 N. Y. 301; Price v. Gover, 40 Md. 102; Worthington v. Tormey, 34 Md. 193; Hubbell v. Drexel, 11 Fed. Rep. 115; Noyes v. Spaulding, 27 Vt. 421; Wood v. Hayes, 15 Gray (Mass.) 375; Berlin v. Eddy, 33 Mo. 426, 430.

[1] Atkins v. Gamble, 42 Cal. 86, 10 Am. Dec. 282; Hawley v. Brumagim, 33 Cal. 394.

[2] Per Crockett, J., in Atkins v. Gamble, 42 Cal. 86, 101: "It is impossible that any sane person should have centered his affections upon a particular stock certificate, or that any violence could be done to his feelings by requiring him to accept another certificate of precisely similar character in lieu of it. His own certificate was only the evidence that he owned an undivided interest in the capital and business of the corporation. Another certificate of the same kind, for the same amount of stock, would entitle him to precisely the same rights as the former certificate. Each would be a precise equivalent of the other, and it is certain he could suffer no pecuniary loss by the transaction, whilst the nature of the property, or rather of his interest in it, forbids the idea that it could be the object of personal attachment or have a peculiar value in his estimation, as contradistinguished from any other equal number of shares in the same company."

There may be a stipulation in a pledge of stock expressly excusing the pledgee from returning the identical certificate. Hardy v. Jaudon, 1 Robt. (N. Y.) 261. But such a stipulation is only useful by way of abundant caution.

Connecticut: "Shares of stock have no individuality, no earmarks. One share does not differ from another share of like stock, in form, characteristic or value. Each share represents simply an undivided, proportionate interest in the ownership of the corporation. It entitles its owner to a certain right in the management, profits and ultimate assets of the corporation, precisely like that which every other share owner enjoys. Certificates of stock, which have earmarks, are not the stocks. They are only the evidence of the ownership of the stocks. They are muniments of title, like title deeds. They have no value save as evidence of the thing owned, which has nothing individual, distinguishable or peculiar about it. Courts have therefore said that no good reason existed for requiring that a pledgee of stocks should at all times preserve a careful separation of distinguishable certificates connected with each transaction of pledge, and maintain the identity of each certificate distinct and unbroken. They have said that the essential thing was that he hold at all times the required shares of stock ready to be delivered when called for, and in recognition of this fact and of the right enjoyed by the pledgee to transfer the stocks held by him in pledge into his own name, they have held that a pledgee fully preserves the rights of the pledgor if he at all times until the termination of the pledge retains similar stock in amount equal to that pledged. This has been held of pledges in their ordinary forms as well as of those incidental to margin transactions."[1]

For the same reason it would seem that a pledgee of negotiable bonds of a private or municipal corporation, or of government bonds, would not be required to retain the identical bonds deposited with him, if he has always had other bonds of precisely the same kind which he could return to the pledgor on demand.[2]

§ 509. When shares of stock are pledged without any agreement that they shall be kept separate from other shares of the

[1] Skiff v. Stoddard, 63 Conn. 198, 218, 23 Atl. Rep. 104, 26 Atl. Rep. 874.

[2] Stuart v. Bigler, 98 Pa. St. 80.

same stock, and no certificate is delivered to the pledgee expressing the trust upon its face, the pledgee may properly have the stock placed to his credit upon the transfer books of the company; and it does not matter that he has other shares of the same stock, or that he buys and sells such stock, and is afterwards unable to identify the shares received in pledge, provided that at all times he has shares of the stock standing in his name or under his rightful and absolute control to an amount equal to the number held in pledge, and is ready and able at any time to redeliver the shares on payment of the debt for which they were pledged.[1] If he sells all the stock

[1] Nourse v. Prime, 7 Johns. Ch. (N. Y.) 69, 4 Johns. Ch. (N. Y.) 490, 8 Am. Dec. 606; Allen v. Dykers, 3 Hill (N. Y.) 593, affirmed 7 Hill (N. Y.) 497; Caswell v. Putnam, 120 N.Y. 153, 24 N. E. Rep. 287; Douglas v. Carpenter, 17 App. Div. (N. Y.) 329, 45 N.Y. Supp. 219; Horton v. Morgan, 19 N. Y. 170; Mayo v. Knowlton, 134 N.Y. 250, 31 N. E. Rep. 985; Gilpin v. Howell, 5 Pa. St. 41, 11 Am. Dec. 403, 45 Am. Dec. 720; Neiler v. Kelly, 69 Pa. St. 409; Boylan v. Huguet, 8 Nev. 345; Fay v. Gray, 124 Mass. 500; Weston v. Jordan, 168 Mass. 401, 47 N. E. Rep. 133; Price v. Gover, 40 Md. 102; Skiff v. Stoddard, 63 Conn. 198, 21 L. R. A. 102, 26 Atl. Rep. 874, 28 Atl. Rep. 104; Hayward v. Rogers, 62 Cal. 348; Thompson v. Toland, 48 Cal. 99; German Sav. Bank v. Renshaw, 78 Md. 475, 28 Atl. Rep. 281; Noyes v. Spaulding, 27 Vt. 420; Worthington v. Tormey, 34 Md. 182; Hubbell v. Drexel, 21 Am. Law Reg. 452 N. S., 11 Fed. Rep. 115. In the latter case Butler, J., said: "A share of stock is without 'ear-marks,' and can not, therefore, be distinguished, as has been said, from others of the same corporation and issue. The certificates, bearing dates and numbers, are but evidence of title. On payment of debt the pledgor is entitled to a return of the number of shares which the pledgee had received —nothing more." In Gilpin v. Howell, 5 Pa. St. 41, Bell, J., said: "It is in general true, that where the pledge is distinctive in its character, and therefore capable of being recognized among other things of a like nature, or where a mark is set upon it with a view to its discrimination, the pledgee is bound to redeliver the identical article pledged, and can not substitute something of a like kind unless so authorized by the contract. But I think there is a manifest difference *ex necessitate* where the thing pledged, from its very nature, is incapable in itself of identification, if once mingled with other things of the same kind. In such case, it is the duty of the pledgor to put a mark upon it by which it may be distinguished; for, as is said in Nourse v. Prime, 7 Johns. Ch. (N.Y.) 69, 4 Johns. Ch. (N. Y.) 490, if a person will suffer his property to go into a common mass without making some provision for its identification, he has no right to ask more than that the quantity he put in should always be there and ready for him. By a just

standing in his own name, but has stock sufficient to meet the demand of the pledgor standing in the name of another person, but absolutely within the pledgee's control, he is not liable for a conversion of the stock.[1]

If a pledgee of corporate shares be himself the owner of other shares in the same corporation, it does not matter that, in selling the shares under a power to satisfy the debt, he is unable to tell whether the stock sold be the identical shares delivered to him as collateral security; such shares not being distinguishable from each other, a sale of one parcel answers the purpose of crediting the debtor with the proceeds of the stock as well as the sale of the specific shares.[2]

But, of course, if there be different kinds of stock of the same corporation, the pledgee is bound to keep within his control, and to restore upon payment, the same kind of stock as that received in pledge. If, for instance, he has received in pledge "consolidated" Erie, he can not fulfill his obligation by keeping on hand and returning "converted" Erie, a stock of a different kind and value.[3]

§ 510. **But it is essential that the pledgee of stock should always have enough of the stock on hand ready for delivery.**[4] In a suit for the conversion of stock pledged by a collateral note, which authorized the creditor to sell the stock on the non-payment of the note, the defendant, being a stock-broker

fiction of law, that *residuum* shall be presumed to be the portion he put in."

The case of *Ex parte* Dennison, 3 Ves. 552, is not in conflict with the rule above stated, for this case was decided with reference to a rule of the Stock Exchange on this subject; and moreover, it is evident that the pledgee in that case did not keep on hand a sufficient number of shares to enable him to return the security at any time on demand.

[1] Le Croy v. Eastman, 10 Mod. 499.

[2] Berlin v. Eddy, 33 Mo. 426.

[3] Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307.

[4] Chamberlain v. Greenleaf, 4 Abb. N. C. (N. Y.) 178; Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311, 6 Duer 56; Allen v. Dykers, 7 Hill (N. Y.) 497, 42 Am. Dec. 87, 3 Hill 593; Baker v. Drake, 66 N. Y. 518; Douglas v. Carpenter, 17 N. Y. App. Div. 329, 45 N. Y. Supp. 219; Taussig v. Hart, 58 N. Y. 425; Hardy v. Jaudon, 1 Robt. (N. Y.) 261, affirmed, 41 N. Y. 619; Thompson v. Toland, 48 Cal. 99; Parsons v. Martin, 11 Gray (Mass.) 111, 117.

and dealer in stock, offered to prove that it was a usage with stock-brokers having such collateral not to hold it specifically, but to transfer it by hypothecation or otherwise, at pleasure, and on payment of the debt to return an equal quantity of the same kind of stock; and that this usage was general and known to the pledgor. Without determining what effect would be due to such proof in the case of a simple pledge as collateral security without any further agreement, it was held that the evidence was inadmissible, as tending to contradict the legal import of the note; that the parties having prescribed in the note the terms of the loan and the conditions under which the collateral might be disposed of, no usage could be incorporated with the agreement of the parties, so as to make the latter import a consent by the debtor that the creditor might use the stock during the running of the loan the same as if he were the absolute owner of it.[1] The pledgor may, however, waive this right.[2]

§ 511. **Moreover it is incumbent upon the pledgee to show that he has always had sufficient stock** of the kind deposited to enable him to return it at any time, for otherwise it might happen that he has made a profit in selling the stock when the price was high, and buying it again when the price had declined. The pledgor in that case would be entitled to take advantage of the pledgee's sale of the stock, although it was wrongful. Therefore, if the pledgee has not the identical certificate of stock which was pledged to him, or the stock issued to himself by the corporation on surrender of that certificate, he should be prepared to show that he has had all the while other shares of the same stock on hand sufficient to meet this and every other obligation resting upon him to deliver that stock. In a suit brought by him upon the debt secured by such stock, it would seem that his inability to return the certificate pledged, or the stock issued to him by the corporation

[1] Allen v. Dykers, 3 Hill (N. Y.) 593.

[2] Ogden v. Lathrop, 65 N. Y. 158.

upon a surrender of that certificate, would be evidence tending to show a conversion of the stock by him, and that the burden would be upon him to show that he had always had during the continuance of the pledge other shares of the same stock not required to meet other obligations which he could have returned to the pledgor at any time upon payment.[1]

§ 512. **When securities belonging to several persons have been rehypothecated together** as security for a single loan, the pledgee taking them should proceed *pari passu* in applying the securities to the satisfaction of the loan, so that each of the several owners of the securities shall bear his just proportion of the common burden. If such pledgee, without notice of the claims of the true owners, sells the securities belonging to one, and therefrom satisfies the claim for which he holds all the securities, leaving the others undisposed of, a court of equity will order the remaining securities to be disposed of, and the proceeds applied in such a manner that the burden of the loan will be borne in equitable proportions by all.[2]

[1] See §§ 421, 422.

[2] Gould v. Central Trust Co., 6 Abb. N. C. (N. Y.) 381; and see Chamberlain v. Greenleaf, 4 Abb. N. C. (N. Y.) 178; Rich v. Boyce, 39 Md. 314; Gould v. Farmers' Loan & Trust Co., 23 Hun (N. Y.) 322; Skiff v. Stoddard, 63 Conn. 198, 21 L. R. A. 102, 26 Atl. Rep. 874, 28 Atl. Rep. 104; Whitlock v. Seaboard Nat. Bank, 60 N. Y. Supp. 611, 29 Misc. (N. Y.) 84.

CHAPTER XIII.

THE RIGHTS OF A SURETY.

I. *His Right of Subrogation to the Creditor's Securities.*

§ 513. **A surety upon paying the debt of his principal is subrogated to the benefit of any collateral security** which the creditor holds for the payment of the debt; and to the benefit of all rights and remedies which the creditor had against the principal debtor.[1] This right is strictly one of subrogation. It arises, however, from a natural equity and not out of any express or implied contract.[2] It does not become fixed and positive until the surety has paid the debt. Before payment he has no control over the creditor's securities; and after payment his right is strictly one of subrogation. His claim arises only when he has extinguished the creditor's claim by paying it. He is then by substitution entitled to stand in the creditor's place, in respect to the securities held by him for the payment of the debt.[3] The surety is entitled to the benefit

[1] Richardson v. Washington Bank, 3 Metc. (Mass.) 536; Guild v. Butler, 127 Mass. 386; Johnson v. Bartlett, 17 Pick. (Mass.) 99; Murrell v. Scott, 51 Tex. 520; Sublett v. McKinney, 19 Tex. 438; Jordan v. Hudson, 11 Tex. 83; Greiner v. Greiner, 58 Cal. 115; Glazier v. Douglass, 32 Conn. 393, 398; Miller v. Ord, 2 Binn. (Pa.) 382; Sheldon on Subrogation, § 86; Maffat v. Greene, 149 Mo. 48, 50 S. W. Rep. 809; Austin v. Belknap, 54 Vt. 495; First Nat. Bank v. Johnson, 65 Vt. 382, 26 Atl. Rep. 634.

[2] Hodgson v. Shaw, 3 M. & K. 183, per Lord Brougham.

[3] Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. Rep. 203; Morton v. Dillon, 90 Va. 592, 19 S. W. Rep. 654.

of the creditor's securities, though in becoming a surety he did not rely upon them, or know of their existence.[1] It is immaterial, also, whether the debtor placed the securities in his creditor's hands at the time when the obligation was contracted or subsequently. Neither does it matter that the surety became such without any contract with the principal debtor, and without his knowledge.[2]

A surety is subrogated to a lien which the creditor has upon his debtor's property. Thus, where a corporation has a lien upon the stock of any stockholder for the payment of any debt due from him to the corporation, a surety for such debt upon paying it is subrogated to this lien.[3] If the lien does not exist by statute in all cases, but depends upon the voluntary act of the corporation, unless the corporation has claimed the lien, none exists, and there is nothing to which the surety can be subrogated.[4]

In this country, moreover, the surety is generally entitled to be substituted to the creditor as to the very debt itself, and to have that assigned to him;[5] though in England the judicial rule was finally settled otherwise, on the ground that when the debt has been paid by the surety, it is technically discharged, and therefore can not be regarded as surviving for the benefit of the surety.[6] This rule was applied to all obligations which are extinguished by the act of payment, such as a bond or other specialty, or a judgment. A similar rule has been adopted by a few courts in this country.[7] A recent statute in England, however, enacts the rule of equitable subrogation to the debt.[8]

[1] Lake v. Brutton, 8 DeG., M. & G. 440.

[2] Mathews v. Aikin, 1 N. Y. 595; Hughes v. Littlefield, 18 Me. 400.

[3] Klopp v. Lebanon Bank, 46 Pa. St. 88; Young v. Vough, 23 N. J. Eq. 325.

[4] Perrine v. Mobile Ins. Co., 22 Ala. 575.

[5] Sheldon on Subrogation, § 87; Sublett v. McKinney, 19 Tex. 438; Lumpkin v. Mills, 4 Ga. 343.

[6] Copis v. Middleton, Turn. & R. 224; Hodgson v. Shaw, 3 M. & K. 183, 190.

[7] As in *Massachusetts*, *Vermont*, *Alabama* and *Nevada*; Sheldon on Subrogation, § 138.

[8] 19 & 20 Vic., c. 97, § 5.

One who has become a surety on the promise of the principal debtor to transfer to the creditor stock as collateral for the debt, may afterwards compel the debtor to make such transfer.[1]

But after being subrogated to the securities held by his principal, the surety is not required to exhaust those securities before obtaining judgment against his principal for the amount of the debt paid by him.[2]

§ 514. **The foundation of this equity** is that any fund placed by the principal debtor in the hands of the creditor or of any surety is a trust to be administered for the benefit of all the parties to the compact. In a recent case before the suprme court, Mr. Justice Matthews admirably stated the principle and its application.[3] "Many sufficient maxims of the law conspire to justify the rule. To avoid circuity and multiplicity of actions; to prevent the exercise of one's right from interfering with the rights of others; to treat that as done which ought to be done; to require that the burden shall be borne by him for whose advantage it has been assumed; and to secure equality among those equally obliged and benefited, are perhaps not all the familiar adages which may legitimately be assigned in support of it. It is, in fact, a natural and necessary equity which flows from the relation of the parties, and though not the result of contract, is nevertheless the execution of their intentions. For, when a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement, that the fund so appropriated shall be administered as a trust for all the purposes which a payment of the debt will accomplish; and a court of equity accordingly will give to it this effect. All this, it is to be observed, as the rule verbally requires, presupposes that

[1] McCoy v. Wilson, 58 Ind. 447.

[2] Maffat v. Greene, 149 Mo. 48, 50 S. W. Rep. 809.

[3] Hampton v. Phipps, 108 U. S. 260, 2 S. C. Rep. 622, 624.

the fund specially pledged and sought to be primarily applied is the property of the debtor, primarily liable for the payment of the debt; and it is because it is so that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is that a pledge made expressly to one is in trust for another, because the relation between the parties is such that that construction of the transaction best effectuates the express purpose for which it was made."

§ 515. **It follows that if a creditor holding collateral security surrenders it to the principal debtor** without the knowledge or consent of a surety of the debt, he thereby discharges him to the extent of the value of the property surrendered.[1] But, of course, he may do it with such consent.[2]

[1] *Connecticut:* Stearns v. Bates, 46 Conn. 306; New London Bank v. Lee, 11 Conn. 112, 27 Am. Dec. 713.

Georgia: Griffeth v. Moss, 94 Ga. 199, 21 S. E. Rep. 463.

Illinois: Kirkpatrick v. Howk, 80 Ill. 122.

Indiana: Stewart v. Davis, 18 Ind. 74; Philbrooks v. McEwen, 29 Ind. 347.

Iowa: Bonney v. Bonney, 29 Iowa 448.

Louisiana: Barrow v. Shields, 13 La. Ann. 57.

Maine: Springer v. Toothaker, 43 Me. 381, 69 Am. Dec. 66; Cummings v. Little, 45 Me. 183.

Massachusetts: Richardson v. Washington Bank, 3 Met. 536, 540; Guild v. Butler, 127 Mass. 386; Baker v. Briggs, 8 Pick. 122, 19 Am. Dec. 311; American Bank v. Baker, 4 Met. 164.

Michigan: Ives v. Bank of Lansingburgh, 12 Mich. 361.

Mississippi: Payne v. Commercial Bank, 6 Sm. & M. 24.

Missouri: Green v. Dougherty, 55 Mo. App. 217.

Nebraska: Bronson v. McCormick Harvest Mach. Co., 52 Neb. 342, 72 N. W. Rep. 312.

New Hampshire: New Hampshire Sav. Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; Sanders v. Reed, 12 N. H. 558, 560.

New York: Chester v. Kingston Bank, 17 Barb. 271, 16 N. Y. 336; Third Nat. Bank v. Shields, 55 Hun 274, 8 N. Y. Supp. 298.

Oregon: Denny v. Seeley, 34 Ore. 364, 55 Pac. Rep. 976; Brown v. Rathburn, 10 Ore. 158.

Pennsylvania: Neff's Appeal, 9 W. & S. 36; Everly v. Rice, 20 Pa. St. 297; Wharton v. Duncan, 83 Pa. St. 40.

Rhode Island: Otis v. Von Storch, 15 R. I. 41, 23 Atl. Rep. 39.

Texas: Harrison Machine Works v. Templeton, 82 Tex. 443, 18 S. W. Rep. 601.

Vermont: Hurd v. Spencer, 40 Vt. 581; First Nat. Bank v. Johnson, 65 Vt. 382, 26 Atl. Rep. 634.

Virginia: Morton v. Dillon, 90 Va. 592, 19 S. E. Rep. 654; Loop v. Summers, 3 Rand. 511.

[2] Batcheldor v. Jennings, 83 Ill. App. 569.

A bank upon discounting a note received as collateral security from a surety an assignment of certain shares of stock of a railroad company, the principal debtor having previously caused a certificate of the shares to be issued to the surety. Subsequently the railroad company was consolidated with another company, and the former company issued to its stockholders coupon bonds to the full amount of its capital stock, and the consolidated company also issued one share of new stock for each share of the old stock. At this time the collateral stock stood upon the books of the company in the name of the surety. The transfer to the bank was executed by an indorsement of the certificate in blank, and no new certificate was taken out by the bank. The bank, however, allowed the principal debtor to receive the bonds issued upon the collateral stock without obtaining the consent of the surety. In an action by the bank against the surety upon the note, it was held that the bank having authorized the railroad company to deliver the bonds to the debtor, or having consented to such delivery, the surety was relieved from his liability upon the note to the extent of his loss by reason of the delivery of the bonds to the debtor.[1]

§ 515a. **A surrender or release of collateral security does not discharge a surety if he is not injured,** and his liability is not affected thereby, as where the security released has only a nominal or imaginary value.[2] In State Bank v. Smith,[3] the court of appeals of New York say: "The release of part of certain real estate in order to make a title to one who purchased it for full value, upon condition that the purchase-money should be applied to the extinguishment of a mortgage that was a prior lien upon the whole estate, was not held to release a surety, because the transaction bettered his condition rather than otherwise.[4] So the surrender of a life policy, held as collateral, upon receipt of its present value, after the prin-

[1] Fitchburg Savings Bank v. Torrey, 134 Mass. 239, Mass. Law Rep., May 3, 1883.

[2] Blydenburgh v. Bingham, 38 N.Y. 371.

[3] 155 N. Y. 185, 200, 49 N. E. Rep. 680.

[4] Neff's Appeal, 9 Watts. & S. 36.

cipal had become bankrupt, and it was doubtful whether he would keep up the policy, did not discharge the surety.[1] Where a creditor released a levy on property of the principal debtor worth $90 in consideration of an order worth $100, that could not have been reached by the execution, it was held that the surety was not discharged because he was benefited by the transaction.'"[2]

§ 516. **If the creditor loses collateral security given him by the principal debtor,** the surety is discharged to the extent of the value of the security lost.[3] If, however, such collateral security is placed, not in the hands of the creditor, but in the hands of a trustee, who is the common agent of both the debtor and the creditor, the latter is not responsible for a loss or mismanagement of the security, unless he connives at it. A trustee, such as a trustee in a mortgage of a stock of horses or other personal property made for the security of the creditor, is not an agent of the creditor, to such an extent as to render the latter responsible for his want of diligence in executing the trust, nor will his subsequent assent to what the trustee has wrongfully done, or neglected to do, relate back and make the creditor responsible for a loss that has already occured.[4]

§ 517. **A surety may even recover from the creditor the amount of the released security,** in case the surety, in ignorance of the creditor's surrender or discharge of the collateral security, has paid the debt or suffered judgment for it to be entered against him.[5] "If the principal debtor has himself

[1] Coates v. Coates, 33 Beav. 249.

[2] Thomas v. Cleveland, 33 Mo. 126. See, also, Commercial Bank v. Western Reserve Bank, 11 Ohio 444; Moss v. Pettingill, 3 Minn. 217; Moss v. Craft, 10 Mo. 720.

[3] Girard Fire & Marine Ins. Co. v. Marr, 46 Pa. St. 504, 507; Union Trust Co. v. Rigdon, 93 Ill. 458; Union Nat. Bank v. Post, 64 Ill. App. 404; Zimpleman v. Veeder, 98 Ill. 613, 617; Hazzard v. Duke, 64 Ind. 220; Wasson v. Hodshire, 108 Ind. 26, 8 N. E. Rep. 621; Murrell v. Scott, 51 Tex. 520; Phares v. Barbour, 49 Ill. 370; Sherraden v. Parker, 24 Iowa 28.

[4] Murrell v. Scott, 51 Tex. 520.

[5] Morton v. Dillon, 90 Va. 592, 19 S. E. Rep. 654; Chester v. Bank of Kingston, 16 N. Y. 336.

paid part of the debt and the surety the residue, when once the creditor is fully satisfied, the same principle of equity which substitutes the surety who has paid the whole debt to the place of the creditor will equally extend and apply to the surety paying a part thereof, to the extent of his payment. A partial payment is sufficient to establish the surety's right against the principal debtor. It is only the creditor who can insist that the debt shall be paid in full.[1] And when the debt has been fully paid the right of the surety is established, to the extent of the payment made by him.'"[2]

The maker of a promissory note who has notified the holder of it as a pledgee that it was given for accommodation only, is entitled to require the holder, before resorting to the note, first to credit actual payments upon other notes for which this was collateral, and also the amount of any other collateral security which he has surrendered without the maker's consent after notice that the latter was only a surety, and to have no judgment rendered against him in an action on the note in excess of the balance of the whole debt for which the note was pledged reduced by the sum of all payments which the plaintiff has actually received and of the collateral security surrendered without the defendant's consent after knowledge that he asserted that he was merely a surety.[3]

§ 517a. **A person pledging his property as security for the payment of the debt of another stands in the position of a surety** of the debtor, and any change in the contract of the principal which would discharge a surety, will operate to release and discharge the property so held as collateral. This rule also applies to mortgages made by one person to secure the debt of another.[4]

[1] Gedye v. Matson, 25 Beav. 310.

[2] Morton v. Dillon, 90 Va. 592, 19 S. E. Rep. 654, per Lacy, J.

[3] Beacon Trust Co. v. Robbins, 173 Mass. 261, 53 N. E. Rep. 868. Citing Guild v. Butler, 127 Mass. 386; Thayer v. Finnegan, 133 Mass. 62, 45 Am. Rep. 285; Fitchburg Savings Bank v. Torrey, 134 Mass. 239; Wilson v. Bryant, 134 Mass. 291, 297; Union Institution for Savings v. Hill, 139 Mass. 47, 50, 29 N. E. Rep. 219; Goodwin v. Massachusetts Loan & Trust Co., 152 Mass. 189, 25 N. E. Rep. 100.

[4] Price v. Dime Sav. Bank, 124 Ill. 317, 15 N. E. Rep. 754; Crawford v.

If the maker of a promissory note pays to the holder the amount of it before it is due and receives the note, a surety of the debt is discharged, although the principal and the holder of the note may not have intended that the transaction should have the effect of payment; and a subsequent pledge of the note by the maker will not bind the surety.[1]

§ 518. **When the fact that one debtor is a surety for another does not appear upon a written instrument,** this collateral fact of the relation between debtors and notice of it to the creditor may be proved by extrinsic evidence. The right of the surety does not depend upon the form of the contract but upon equities arising out of his relation to the other parties to it; and the creditor is affected with knowledge of this relation, acquired at any time before he does any act which alters the position of the surety.[2]

§ 518a. **If a third person without knowledge that a surety has any equitable rights in collateral security takes a transfer of such security,** the surety's equitable right of subrogation must yield to the right of the assignee who has taken title without notice of any intervening right. A father and son gave their note to a savings bank in payment of prior indebtedness of the son, the father giving a mortgage upon his land to secure the note, and at the same time the son's wife also giving a mortgage upon her land, but not signing the note. The son and his wife agreed to indemnify the father, but there was nothing to show that this agreement was known to the bank.

Richeson, 101 Ill. 351; Rowan v. Sharpe Rifle Manuf. Co., 33 Conn. 18; Burnap v. National Bank of Potsdam, 96 N. Y. 125; Bank of Albion v. Burns, 46 N. Y. 170; Barnes v. Mott, 64 N. Y. 397, 21 Am. Rep. 625; Christner v. Brown, 16 Iowa 130; White v. Ault, 19 Ga. 551.

[1] First Nat. Bank v. Harris, 7 Wash. 139, 34 Pac. Rep. 466.

[2] Guild v. Butler, 127 Mass. 386; Harris v. Brooks, 21 Pick. (Mass.) 195, 32 Am. Dec. 254; Carpenter v. King, 9 Met. (Mass.) 511, 43 Am. Dec. 405; Wilson v. Foot, 11 Met. (Mass.) 285; Horne v. Bodwell, 5 Gray (Mass.) 457; Blackmore v. Granbery, 98 Tenn. 277, 282, 39 S. W. Rep. 229; United States v. Kirkpatrick, 9 Wheat. 720.

Several years later the son's wife gave a second mortgage on her lot to a third person, and still later a third mortgage to another, who took assignments of the two mortgages to the bank and of the second mortgage given by the son's wife. On a bill in equity brought by the father to redeem his mortgage, and to be subrogated to the benefit of the first mortgage given by the son's wife to the bank, it was held that he was not entitled to such subrogation as against the assignee of the mortgage. If the plaintiff were allowed by way of subrogation to have the benefit of the mortgage given by the son's wife to the bank, it would impair the security of the other mortgages given by her which the defendant held. It would not be equitable to allow this to happen as against the defendant who had taken title on the faith of what was to be gathered from the records.[1]

§ 518b. **A surety on a note which is the principal debt is discharged by an extension of the time of payment of that note,** without the surety's consent. A surety on the collateral note is not so discharged if the collateral note is an independent obligation resting on a distinct consideration; but if the consideration of the principal note and of the collateral are the same an extension of the principal note without the consent of the surety discharges him. "In the ordinary case of holding one note or contract as collateral to another, each note or contract rests upon a distinct consideration. The extension of time on a principal note or contract, which would release sureties upon it, would not affect a note or contract belonging to the principal debtor upon a distinct and different consideration held as collateral to it. When the principal and collateral contracts are upon separate and different considerations, if the collateral matures after the principal, it survives and may be enforced after the principal has become barred by limitations. In such cases, also, where the collateral matures before the

[1] Rand v. Cutler, 155 Mass. 451, 29 N. E. Rep. 1085; New England Trust Co. v. New York Belting & Packing Co., 166 Mass. 42, 43 N. E. Rep. 928.

principal, it may be enforced before the principal debt is due. The right of action on the collateral is in no way dependent upon the principal debt, except that the principal must remain unpaid to give the right to enforce the collateral, * * * while the payment of the principal might have been extended without affecting the collateral, if the agreement for the extension had reserved the right to proceed on the collateral notwithstanding the extension; where no such right was reserved the extension of time for the payment of the debt extended the time on all notes or contracts held by the creditor for it, which were not supported by a consideration different from the one for which the principal note was given.'"[1]

§ 519. **A creditor taking collateral security from a debtor, without giving time, does not discharge a surety** of the debt.[2] Mere delay by the creditor to sue the principal debtor does not discharge the surety, for the obvious reason that the surety may at any time discharge his obligation to the creditor, and thus make the principal his debtor.[3] For the same reason the law implies no contract on the part of a creditor holding collateral security to proceed to enforce such security before he can sue a surety of the debt after its maturity. Neither is it any defense for the surety that the collateral has depreciated between the time of the maturity of the debt and the commencement of suit against the surety.[4]

§ 520. **A surety is released by any false statement made by the creditor as to the existing condition of the collateral security,** which puts the surety off his guard, and causes him to lose the opportunity to protect himself, although the state-

[1] Slagle v. Pow, 41 Ohio St. 603, 605, per McCauley, J. Also, Price v. Dime Sav. Bank, 124 Ill. 317, 15 N. E. Rep. 754; Dodgson v. Henderson, 113 Ill. 360; First Nat. Bank v. Harris, 7 Wash. 139, 34 Pac. Rep. 466.

[2] Sigourney v. Wetherell, 6 Met. (Mass.) 553; Norton v. Eastman, 4 Me. 521; Prather v. Young, 67 Ind. 480.

[3] Forstall v. Fussell, 50 La. Ann. 249, 23 So. Rep. 273; Schroeppell v. Shaw, 3 N. Y. 446, 5 Barb. 580.

[4] Brick v. Freehold Nat. Banking Co., 37 N. J. L. 307.

ment be innocently made.[1] Thus, if a creditor informs a surety that the principal debtor has paid the debt, and the surety thereupon relinquishes security which he has received from the principal, this is a good defense to an action by the creditor against the surety, though the creditor did not intend to mislead him.[2] But where a loan was made upon a note having a memorandum that railroad *bonds* to a certain amount were collateral to it, but, in fact, *notes* of railroad company to the same amount were deposited as collateral, sureties upon the note were not discharged in consequence of a statement to one of them by the payee, that the bonds were deposited with the note, when the inquiry made of him did not direct his attention to the question whether the securities deposited were of the kind named in the memorandum or not; but the inquiry was such that the creditor would naturally suppose it was directed to the point of ascertaining whether he held the securities which he had taken when the loan was made, or had surrendered them.[3]

§ 521. **As between a surety and a creditor to whom the principal debtor has given collateral security covering also other obligations,** the surety is not precluded from showing that he was induced to become a surety for the debtor upon the faith of a parol agreement between him and the creditor to the effect that the collateral security should be applied primarily to the payment of the obligation signed by the surety, even though such parol agreement might be inconsistent with the agreement in regard to the collateral made between the principal debtor and the creditor. Such parol agreement being established, the creditor is bound to apply the proceeds of a sale of the collateral in accordance therewith. Such evidence is not liable to objection on the ground that it contradicts such written agreement, because this objection could only apply to the parties to the agreement.[4]

[1] Baker v. Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311.

[2] Carpenter v. King, 9 Met. (Mass.) 511, 43 Am. Dec. 405.

[3] Fitchburg Savings Bank v. Rice, 124 Mass. 72.

[4] Fant v. Sprigg, 50 Md. 551. Whether sureties upon other obliga-

§ 522. **A surety's right of subrogation to the creditor's securities does not arise until the surety has paid the debt.**[1] But immediately upon such payment this equity arises in favor of the surety, and he is entitled to have the securities held by the creditor turned over to him.[2] Payment itself operates as an equitable assignment of such securities to the surety. The whole debt must, however, be paid before the right of subrogation will arise; a partial satisfaction of the debt gives the surety no right to claim the benefit of any part of the securities.

A pledgee is not obliged to exhaust his collateral securities before proceeding against a surety or guarantor, nor is the surety or guarantor entitled to be credited with the value of such collaterals, but only to be subrogated to the rights of the pledgee when the debt has been paid.[3]

A surety may apply securities which the debtor has placed in his hands for his indemnity as soon as the pledgor's debt falls due.[4]

II. *The Creditor's Equitable Right to the Surety's Securities.*

§ 523. **On the other hand, any security for the payment of the debt placed in the hands of a surety is a trust in favor of the creditor,** which he may avail himself of at any time after

tions secured by the same collateral might not object to such application of it, was a question which was not considered in this case, because they were not parties to the controversy.

[1] Hampton v. Phipps, 2 S. C. Rep. 622, 626, per Matthews, J.

[2] Klopp v. Lebanon Bank, 46 Pa. St. 88; Loughridge v. Bowland, 52 Miss. 546; McCormick v. Irwin, 35 Pa. St. 111; Magee v. Leggett, 48 Miss. 139; Jones v. Tincher, 15 Ind. 308, 77 Am. Dec. 92; Atwood v. Vincent, 17 Conn. 575; Lewis v. Palmer, 28 N. Y. 271; Wayland v. Tucker, 4 Gratt. (Va.) 267, 50 Am. Dec. 76; York v. Landis, 65 N. C. 535; Denny v. Seeley, 34 Or. 364, 55 Pac. Rep. 976; Keel v. Levy, 19 Or. 450, 24 Pac. Rep. 253.

For the distinction between a contract to indemnify against liability, and a contract to indemnify against damage resulting from a liability, see Merchants' & Manuf's' Nat. Bank v. Cumings, 149 N. Y. 360, 44 N. E. Rep. 173, affirming 79 Hun 397, 29 N. Y. Supp. 782; Belloni v. Freeborn, 63 N. Y. 383, 390; Russell v. La Roque, 11 Ala. 352; Hapgood v. Wellington, 136 Mass. 217.

[3] Deering v. Russell, 5 N. Dak. 319, 65 N. W. Rep. 691.

[4] Vest v. Green, 3 Mo. 219.

the debt matures; and it is immaterial whether the creditor was apprised of the giving of such security at the time or not.[1] The earliest case in which this equitable right is declared and enforced is that of Maure v. Harrison, decided in 1692.[2] The whole report is as follows: "A bond creditor shall, in this court, have the benefit of all counter bonds or collateral security given by the principal to the surety; as if A. owes B. money, and he and C. are bound for it, A. gives C. a mortgage or bond to indemnify him, B. shall have the benefit of it to recover his debt."

These authorities generally make the creditor's right to the security an absolute one, without reference to the insolvency of either the debtor or the surety, though the later cases in England have disregarded or repudiated the authority of Maure v. Harrison, and have made the creditor's right to re-

[1] *Alabama:* McMullen v. Neal, 60 Ala. 552; Toulmin v. Hamilton, 7 Ala. 362; Ohio Life Ins. Co. v. Ledyard, 8 Ala. 866; Cullum v. Branch Bank, 23 Ala. 797.

Kansas: Seibert v. True, 8 Kan. 52; Seibert v. Thompson, 8 Kan. 65.

Kentucky: Bronston v. Robinson, 4 B. Mon. 142; Moore v. Moberly, 7 B. Mon. 299; Helm v. Young, 9 B. Mon. 394; Havens v. Foudry, 4 Metc. 247; Black v. Kaiser, 91 Ky. 422, 16 S. W. Rep. 89.

Maryland: Baltimore & Ohio R. Co. v. Trimble, 51 Md. 99; Kunkel v. Fitzhugh, 22 Md. 577; Owens v. Miller, 29 Md. 144, 161.

Massachusetts: Eastman v. Foster, 8 Met. 19; Rice v. Dewey, 13 Gray 47.

Missouri: Thornton v. Exchange Bank, 71 Mo. 221.

New York: Moses v. Murgatroyd, 1 Johns. Ch. 119, 7 Am. Dec. 478; Heath v. Hand, 1 Paige 329; Vail v. Foster, 4 N. Y. 312.

North Dakota: Deering v. Russell, 5 N. Dak. 319, 65 N. W. Rep. 691.

Pennsylvania: Cornwell's Appeal, 7 W. & S. 305; Kramer's Appeal, 37 Pa. St. 71; *In re* Martin, 1 Pearson 37; Jack v. Morrison, 48 Pa. St. 113; Rice's Appeal, 79 Pa. St. 168.

Tennessee: McRady v. Thomas, 16 Lea 173; Day v. Proffet, 15 Lea 517; Kinsey v. McDearmon, 5 Coldw. 392; Saylors v. Saylors, 3 Heisk. 525; Breedlove v. Stump, 3 Yerg. 257.

[2] 1 Eq. Cas. Abr. 93, case 5.

Mr. Joseph Willard, in a learned article (14 Am. Law Rev. 839, 842), to which I am much indebted, comments upon this case as follows: "This, it will be observed, states the right as an absolute one, and suggests no condition of insolvency on the part of either debtor or surety as a prerequisite to the exercise of the equity; nor any necessity of judgment to be first obtained by the creditor, or that the liability of the surety should be otherwise fixed; nor any limit as to the time when the creditor could enforce his right."

lief depend upon the bankruptcy of both the debtor and the surety.[1]

§ 524. **That a creditor did not rely upon securities given by the debtor to a surety**, and did not know of their existence until long after they were given, does not prevent his claiming the benefit of them whenever he may learn of their existence. This point was established in an early and leading case in this country, where a bill was brought by the holder of indorsed paper to have securities given by the debtor to the indorser applied for the creditor's benefit. The indorser set up in defense that he had assigned the securities, and also that he was a general creditor of the debtor, who had become insolvent. Chancellor Kent held that the creditor was entitled to the benefit of the indorser's securities, saying:[2] "These collateral securities are, in fact, trusts created for the better protection of the debt, and it is the duty of this court to see that they fulfill the design. And whether the plaintiffs were apprised at the time of the creation of this security is not material. The trust was created for their benefit, or for the better security of their debt, and when it came to their knowledge they were entitled to affirm the trust and enforce its performance."

It is not necessary that the creditor should know that the debtor has secured the surety in order to enable him to claim the benefit of the security as a trust in his behalf, because the trust being for his benefit it is presumed that it has his assent.[3] "The authorities place the principle upon the ground that as the security is a trust created for the better securing of the debt, it attaches to it, and hence it is that it may be made available by the creditor, although unknown to him at the time of the purchase of the security, for which it may have been given as an indemnity. The effect of such a transaction

[1] *Ex parte* Waring, 19 Ves. 345.

[2] Curtis v. Tyler, 9 Paige (N. Y.) 432; Pratt v. Adams, 7 Paige (N. Y.) 615; Keyes v. Brush, 2 Paige (N.Y.) 311; Haggerty v. Pittman, 1 Paige (N. Y.) 298, 19 Am. Dec. 434; Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 119, 7 Am. Dec. 478.

[3] McMullen v. Neal, 60 Ala. 552; Kramer's Appeal, 37 Pa. St. 71.

is the placing of means in the hands of the surety by the principal debtor to meet liability on account of his contract of suretyship. It is, consequently, a trust for that specific purpose, and equity will control the legal title to it in hands of the surety, so that it may be applied to the object intended, viz., the payment of the debt to the holder."[1]

§ 525. **In several states, however, the creditor's equity is merely a right to be subrogated** to the securities held by the surety, or a right to be substituted in the surety's place for the enforcement of any securities he may have taken from the principal debtor. The creditor's right in respect to securities in the hands of the surety is regarded as resting upon the same ground as the surety's right in respect to securities held by the creditor.[2] "This arises not from any notion of mutual contract between the parties, that in providing for the surety the creditor shall be equally provided for, but from a principle of natural equity independent of contract; namely, that to prevent the surety from being first harassed for the debt or liability, and then turning him round to seek redress from the collateral security given by the principal, a court of equity will authorize, and even encourage, the creditor to claim through the medium of the surety all the rights he has thus acquired to be exercised for his benefit, and in discharge of his obligations. The claim of the creditor, therefore, is as much founded on the well-known doctrine of substitution, as the claim of the surety to stand in the place of the creditor who has received collateral security from the debtor; and, in my opinion, it has no other foundation. For when the principal debtor conveys property to his surety, not specifically bound to the creditor, he has no intention of giving any lien to the creditor, or to pledge the property to him for the debt; and as

[1] Kramer's Appeal, 37 Pa. St. 71, per Thompson, J.

[2] *Virginia:* Hopewell v. Cumberland Bank, 10 Leigh 206; Bank v. Boisseau, 12 Leigh 387. *Ohio:* McConnell v. Scott, 15 Ohio 401, 45 Am. Dec. 583; Kramer v. Farmers' Bank, 15 Ohio 253; Ohio Loan & Trust Co. v. Reeder, 18 Ohio 35. *Mississippi:* Osborn v. Noble, 46 Miss. 449; Carpenter v. Bowen, 42 Miss. 28; Bibb v. Martin, 14 Sm. & M. 87.

he has a right to dispose of his property as he pleases, provided he commits no fraud, the court will not construe the instrument giving the lien beyond the intent; although it will, to effect the exoneration of innocent sureties, permit their substitution to the creditor's rights, or his substitution to theirs."[1]

§ 526. **A distinction is to be observed between cases where the security has been given to the surety for the payment of the debt** and cases where it has been given solely for his indemnity.[2] In the first class of cases the primary purpose of the debtor may fairly be taken to be to secure the payment of the debt; while in the latter class of cases his purpose seems to be primarily to secure the surety. In the former class of cases the creditor may fairly be regarded as a direct beneficiary in the property placed in the control of the surety; but in the latter class of cases the creditor is secured only indirectly through the surety. There is, however, much difficulty in determining whether a case falls within one class or the other, from the fact that directly opposite views are taken in different jurisdictions of instruments of the same tenor. "Thus,[3] where a mortgage is given in terms conditioned to save the surety harmless, and to pay the notes, the former clause has been held by some courts to give the controlling character to the instrument as an indemnity;[4] while with others the latter clause has been viewed as decisive that it created a direct trust to pay the debt."[5]

[1] Hopewell v. Bank of Cumberland, 10 Leigh (Va.) 206, 221, per Parker, J.

[2] In New Bedford Inst. Sav. v. Fairhaven Bank, 9 Allen (Mass.) 175, the security was merely for the indemnity of the surety; and the distinction between an indemnity and a direct trust for the payment of the debt was pressed upon the court, but was rejected as immaterial. See also, Black v. Kaiser, 91 Ky. 422, 16 S. W. Rep. 89.

[3] 14 Am. Law Rev. 855.

[4] As in *Connecticut:* Thrall v. Spencer, 16 Conn. 139; Jones v. Quinnipiack Bank, 29 Conn. 25. *Illinois:* Constant v. Matteson, 22 Ill. 546. *Kentucky:* Havens v. Foudry, 4 Metc. (Ky.) 247. *Missouri:* Haven v. Foley, 18 Mo. 136.

[5] As in *Massachusetts:* Eastman v. Foster, 8 Metc. 19. *Mississippi:* Ross v. Wilson, 7 S. & M. 753. *Tennessee:* Saylors v. Saylors, 3 Heisk. 525. *Vermont:* Paris v. Hulett, 26 Vt. 308. *Maryland:* Kunkel v. Fitzhugh, 22 Md. 567; Boyd v. Parker, 43 Md. 182.

§ 527. **As between the doctrine of the creditor's equitable lien and the doctrine of his right of subrogation,** the weight of authority seems to be clearly in favor of the former. The former properly applies to cases where the securities have been placed in the surety's hands for the payment of the debt; and the latter to cases where the securities have been placed in his hands purely for his indemnity. In fact, however, there is no such sharp distinction in the application of these doctrines to these different classes of cases; for, as already noticed, similar instruments have been regarded by different courts as falling under each of these classes. We have noticed, too, the tendency of the courts to regard the security in the surety's hands as a trust for the payment of the debt rather than as a mere indemnity to the surety. To regard it as a trust seems better to satisfy the natural equities of the transaction. "We think," says Mr. Willard, "that subrogation fails to exhaust and satisfy the equities of the various modes in which securities are delivered for the surety's indemnity, in that, first, it overlooks the real sense of the transfer, which is to reimburse the surety only if he has paid, and if he has not paid, then, to enable him to do so; in a word, to pay the debt, but through the surety.[1] Secondly, by adhering so literally to the words of the transfer, it confers upon the surety an absolute control over the security, which may, and often does utterly defeat the payment of the debt.[2] Thirdly, it is, in practice, a rule of very difficult application, because of the widely differing forms in which this indemnity is given, in some cases directly to the surety, in others in trust for him, where he can assert a control only by himself becoming a suitor in law or equity; in other cases, again, no instrument defining the terms of the transfer, but only a simple delivery of the security being made to the surety."[3]

§ 528. **The creditor is entitled at any time after the delivery of the security to control or enjoin any misappropriation of**

[1] Lewis v. DeForest, 20 Conn. 427, 442, 443.

[2] Rankin v. Wilsey, 17 Iowa 463.

[3] 14 Am. L. Rev. 851.

the security, where the creditor's right is regarded as a trust, though until the maturity of the debt, his trust lien does not fully attach to the security. Thus, if the surety has been indemnified by receiving collateral notes from the debtor, he will be regarded as holding such notes as trustee for the benefit of the creditor who may obtain an injunction restraining him from negotiating the notes.[1]

Inasmuch as the creditor's right rests upon the trust in his favor he has an interest in the securities from the time they are given which he may interfere to protect, and he need not wait till the surety's liability has become fixed.

A surety who has received in pledge a negotiable note can, of course, before its maturity and while it is not subject to equities, transfer it; and any one taking it for value and in good faith will not be affected by any trust in favor of the creditor, nor will he be responsible for the manner in which the surety applies the proceeds.[2]

§ 529. **But where the creditor's right is one of substitution merely he can not assert it until the surety's liability has become fixed,** whether by maturity of the debt, or by demand or by judgment. Until such time the surety has full control of the securities, and may dispose of them as he pleases. Thus, where rents were pledged to a surety, and before his liability was fixed, he purchased the fee of the premises, it was held that they were placed beyond the creditor's reach by the merger.[3] The doctrine of the creditor's equitable lien has been criticised because it impliedly overrides the surety's proper control of his indemnity, while he remains solvent; and on the other hand the doctrine of subrogation is criticised because it denies to the creditor the just protection to which he is entitled.[4] Until the surety's insolvency he would seem to be primarily entitled to control the security, because until

[1] Clark v. Ely, 2 Sandf. Ch. (N. Y.) 166.

[2] Commercial Bank v. Rochester City Bank, 46 Barb. (N. Y.) 371.

[3] Rankin v. Wilsey, 17 Iowa 463.

[4] 14 Am. Law Rev. 852.

that occurs the presumption is that he will pay the debt; but in the meantime the creditor should be entitled to enjoin the surety from willfully misappropriating the security.

Upon the insolvency of both the principal and the surety, the creditor is entitled to the benefit of security held by the surety merely for his indemnity;[1] and he is entitled to it upon the insolvency of the surety alone. It is even said that "While in no view does the insolvency of the principal debtor create the equity, although it may be a material point in defining when the creditor's claim matures, excusing demand or the like; on the other hand, the insolvency of the surety seems an indispensable element to the enforcement of that equity, and to give to it vitality."[2]

§ 530. **The discharge of the surety does not bar the creditor's right** to claim the securities, which the debtor has placed in the surety's hands for the payment of the debtor for his indemnity where the creditor does not claim by subrogation, or through the surety, but by virtue of a trust which a court of equity will protect and enforce for the creditor's benefit. The trust survives the surety's discharge.[3]

But where the creditor's right is one of subrogation, it is clear that the discharge of the surety before his liability becomes fixed will bar the creditor's right to receive and enforce the surety's securities.[4]

§ 531. **A surety holding collateral security may transfer it to the principal creditor,** who is entitled upon default to proceed to make the money out of such security before suing the

[1] *In re* Foye, 16 N. Bank. R. 572; *In re* Fickett, 72 Me. 266.

[2] 14 Am. Law Rev. 852; Lewis v. DeForest, 20 Conn. 427; Jones v. Quinnipiack Bank, 29 Conn. 25.

[3] Roberts v. Colvin, 3 Gratt. (Va.) 358, 359; Eastman v. Foster, 8 Metc. (Mass.) 19; Cullum v. Branch Bank, 23 Ala. 797; Crosby v. Crafts, 5 Hun (N. Y.) 327; Helm v. Young, 9 B. Mon. (Ky.) 394.

[4] Osborn v. Noble, 46 Miss. 449; Bibb v. Martin, 14 Sm. & M. (Miss.) 87; Hopewell v. Cumberland Bank, 10 Leigh (Va.) 206.

principal note. The rule is not changed by the fact that such security is another note and mortgage.[1]

But a surety holding property in pledge to indemnify him for his liability upon a note, has no right to transfer the property to the holder of the note in satisfaction of it; and if he does, the transfer does not change the status of the property as a pledge, or deprive the pledgor of his right to redeem it.[2]

If a surety exchanges the securities he has received for others, or receives others in payment for the original securities, he will hold the new securities for the benefit of the creditor upon the same trust that he held the original securities.[3]

§ 532. **One may hold a pledge both as creditor and as surety.** Thus it may be given him to secure a debt due to himself, and also to indemnify him against a debt for which he is surety; and in that case though it has been said that as between himself and the creditor the latter is entitled to be first paid out of the proceeds of the property,[4] because the surety is regarded as a *quasi*-trustee for the creditor as to such property; yet the better rule would seem to be to apply the security *pro rata*,[5] or if the surety has himself obtained the security, that he should be entitled to appropriate so much of it as might be necessary for the payment of his own demand in full.[6]

A creditor holding in pledge his debtor's goods to a greater value than the debt due him, entered into an arrangement with another creditor of the pledgor whereby he transferred the goods to the other creditor, who thereupon guaranteed the payment of this debt. The debtor, though not a party to this arrangement, afterwards assented to it; and the goods subsequently having been attached as the debtor's property, it was

[1] Wells v. Smith, 2 Utah 39. And see Phillips v. Thompson, 2 Johns. Ch. (N. Y.) 418, 7 Am. Dec. 535.

[2] Morgan v. Dod, 3 Col. 551.

[3] Clark v. Ely, 2 Sandf. Ch. (N. Y.) 166.

[4] Ten Eyck v. Holmes, 3 Sandf. Ch. (N. Y.) 428.

[5] Moore v. Moberly, 7 B. Mon. (Ky.) 299; Ross v. Wilson, 7 Sm. & M. (Miss.) 753.

[6] Brown v. Ray, 18 N. H. 102, 45 Am. Dec. 361.

held that although the first pledgee lost his lien upon the goods by surrendering them to the other creditor and taking his guaranty, the latter by the debtor's assent to the arrangement, acquired as pledgee a valid lien on the goods for the payment of both debts; a lien for the debt due to him, and a lien to indemnify him against the liability incurred by his guaranty.[1]

§ 533. **A dividend received in bankruptcy or insolvency by a creditor whose claim is in part secured by a pledge given by a surety** should be applied ratably to the whole demand; that is, ratably upon the secured and the unsecured portion of the whole demand. The surety is regarded as having secured a limited part of an entire debt, and not the unpaid balance of a debt with a limitation as to the amount of the liability. If security be given for a separate and distinct part of a debt, then a dividend arising from that part of the debt must be applied to the discharge of that part. The intention of the parties to the transaction is to be considered. If a surety pledge bonds to secure an unpaid balance of one hundred thousand dollars upon a much larger debt, and a dividend in bankruptcy of fifty per cent. be paid upon the whole debt, it is immaterial to the surety how or by whom the balance be paid, so long as one hundred thousand dollars remain unpaid; but if the dividend reduce the balance below that amount the surety is entitled to the benefit of the reduction, because upon payment of the debt he would be subrogated to the creditor's lien upon the bonds.[2]

§ 533a. **A surety is not released by the substitution, by the creditor, of one collateral security for another,** when made in good faith and apparently for the benefit of all concerned. Thus, a surety is not released by the exchange, by a creditor bank, of a judgment against an insolvent principal debtor, whose property has been exhausted, for an agreement by its

[1] Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770.

[2] Dumont v. Fry, 14 Fed. Rep. 293, 12 *ib.* 21, 13 *ib.* 423.

president individually to pay the debt out of the proceeds of the property of the debtor purchased by him at execution sale, after he has realized enough to pay an indebtedness to himself, when no bad faith appears and it is not shown that the substituted security was worth less than the judgment. The court of appeals of New York, so holding, said: "The sureties were not injured in fact, nor were they injured in law, unless the exchange, under any circumstances, of one collateral security for another, is so inconsistent with the legal rights of a surety as to raise a conclusive presumption of injury therefrom. No authority has been cited, and we have been able to find none, holding that a surety may not in good faith endeavor to better his situation by exchanging one kind of collateral for another that he regards as more valuable. If a bank holds bonds of doubtful value as security for a note made by sureties for the principal debtor, may it not exchange those bonds for others that it regards of greater value without releasing the sureties? If it can not, the law deprives it of the right to make the best use of its collateral that it can and compels it to refrain from trying to better its condition, lest, although acting honestly and for what it regards as its own interest as well as the interest of the sureties, it may make a mistake to their detriment. The rule that a surety is discharged *pro tanto* through the surrender of security by the creditor does not rest on contract, but upon the equitable principle that the property of the debtor, pledged for the payment of the debt, should be applied on the debt. In such a case the surety is discharged to the extent that he is injured. A diversion of security which results in no injury to the surety does not affect his liability, for payment of the debt with the accompanying right of subrogation would be of no value.'"[1]

[1] State Bank v. Smith, 155 N. Y. 185, 199, 49 N. E. Rep. 680, per Vann, J., affirming 85 Hun 200, 32 N. Y. Supp. 999.

III. *The Mutual Equities of Co-Sureties to Claim the Benefit of Each Other's Securities.*

§ 534. **There is also a mutual equity between co-sureties** that securities placed by the principal debtor in the hands of one surety to indemnify him for his liability, inure to the benefit of all other sureties for the debt.[1] Like the other equities already spoken of, this is a natural equity, and does not depend upon any contract;[2] though it is said that it may be presumed that the debtor in securing one surety intended that all the sureties should share in the benefit of the security unless there be something to show that such was not his intention; for in securing one surety he may expressly exclude his co-sureties from the benefit of the security given.[3]

§ 535. **But a creditor is not entitled to the benefit of securities placed by one surety in the hands of another** for his indemnity. Thus, where co-sureties upon a bond agreed between themselves that each should be liable for the payment of a certain part of the bond, and that each should indemnify the other from all claim by reason of his liability upon the bond in excess of the sum or proportion which each was to be liable for, and each gave to the other security for the performance of his agreement; it was held upon the insolvency of the sureties as well as the principal debtor, that the securities given by the sureties to each other were not in equity securities for the payment of the principal debt, which would inure by way of subrogation to the benefit of the creditor.[4] Mr. Justice Matthews, after stating the equitable rule and the grounds of it, as quoted in a preceding section,[5] declared that the present

[1] Hampton v. Phipps, 108 U. S. 260, 2 S. C. Rep. 622, per Matthews, J.; Aldrich v. Hapgood, 39 Vt. 617; Fishback v. Weaver, 34 Ark. 569; Sheehan v. Taft, 110 Mass. 331; Lane v. Stacy, 8 Allen (Mass.) 41; Hartwell v. Whitman, 36 Ala. 712.

[2] Dering v. Winchelsea, 1 Cox 318; Brown v. Ray, 18 N. H. 102, 45 Am. Dec. 361.

[3] Moore v. Moore, 4 Hawks. (N. C.) 358, 15 Am. Dec. 523.

[4] Hampton v. Phipps, 108 U. S. 260, 2 S. C. Rep. 622.

[5] § 514.

case could not be brought within the terms or the reason of the rule; "for as the property, in respect to which the creditors assert a lien, was not the property of the principal debtor, and has never been expressly pledged to the payment of the debt, so no equitable construction can convert it by implication into a security for the creditor. It is urged that the logic of the rule would extend it so as to cover the case of all securities held by sureties for purposes of indemnity of whatsoever character and by whomsoever given. But this suggestion is founded on a misconception of the scope of the rule and the rational grounds on which it is established. Of course, if an express trust is created, no matter by whom nor of what, for the payment of the debt, equity will enforce it, according to its terms, for the benefit of the creditor, as a *cestui que trust;* but the question concerns the creation of a trust, by operation of law, in favor of a creditor, in a case where there was no duty owing to him, and no intention of bounty. A stranger might well choose to bestow upon a surety a benefit and a preference from considerations purely personal, in order to make good to him exclusively any loss to which he might be subjected in consequence of his suretyship for another. In such case, neither co-surety nor creditor could, upon any ground of priority in interest, claim to share in the benefit of such a benevolence."

§ 536. **That one surety has pledged his own property to another surety for the same debt,** does not release the principal debtor from his implied contract to repay either surety any sum he may have to pay upon the debt. A private arrangement between co-sureties for the distribution of liability *inter sese*, does not, unless expressly so stipulated, release the liability of the common principal to either of them. That one of several signers of a note pledges his own property to another, does not necessarily prove that he is really the principal debtor; for one surety may find it for his interest to pledge his property to another surety.[1]

[1] Water Power Co. v. Brown, 23 Kan. 676.

§ 537. **A surety's right of subrogation does not arise until he has paid the debt.** This is true of his right as against the creditor, and as against his co-surety as well. Therefore, if two co-sureties agree between themselves to share the responsibility for the debt in certain proportions, and accordingly indemnify each other by mortgage for such proportions, and both become insolvent without paying any part of the debt, the right of subrogation never arises between them; and for this reason, as well as for the reason that the security was not the property of the principal debtor, the creditor can not enforce the security for his own benefit. "Unless one of them had been compelled to pay, and had in fact paid, an excess beyond his agreed share of the debt, there could have been no breach of the conditions of the mortgage, and consequently no right to a foreclosure and sale of the mortgaged premises. And the amount which the mortgagor could be required to pay, as a condition of redeeming the mortgaged premises, in case of foreclosure, would be, not the amount which the mortgagee, as between himself and the common creditor, was bound to pay on account of the debt, but the amount which, as between himself and his co-surety, the mortgagor, he had paid beyond the proportion which, by the terms of the agreement between them, was the limit of his liability. The mortgages were not created for the security of the principal debt, but as security for a debt possibly to arise from one surety to the other. As to which of them has there been as yet any default? Plainly none as to either. And yet the complainants assert the right to foreclose them both; a claim that is self-contradictory, for, by the very nature of the arrangement, it is impossible that there should be a default as to both. The fact that one mortgagor had failed to perform his part of the agreement could only be on the supposition that the other had not fully performed it on his part, but had paid that excess against which his co-surety had agreed to indemnify him. There is, therefore, no right to the subrogation insisted on, because there is nothing to which it can apply."[1]

[1] Hampton v. Phipps, 108 U. S. 260, 2 S. C. Rep. 622, 626, per Matthews, J.

§ 538. **A surety is subrogated to securities placed in the hands of the creditor by his co-surety only to the amount he has actually paid for such co-surety.**[1] Ordinarily and in the absence of any express agreement co-sureties as between themselves are liable for equal shares of the principal debt. Thus in case there are two co-sureties, one of them upon paying the whole debt can enforce against the other the payment of only half of it; and in case one such co-surety is insolvent, the surety who has paid the debt can prove against his estate for only half the amount of the debt paid by him. He can prove for no more, although in his settlement with the creditor he has received an assignment of the debt and of the proof of the debt, which the creditor has already made for the full amount of the debt against the estate of his co-surety. In such case the creditor's proof for the whole amount of the debt against the estate of the co-surety will be expunged, and the surety who has received an assignment of the debt will be allowed to prove for only half of the amount of it. Mr. Justice Devens, delivering the opinion of the supreme court of Massachusetts in a case relating to the rights of co-sureties under such circumstances, said:[2] "If it be conceded that the surety paying the debt is equitably entitled to the benefit of such security as may have been deposited with the creditor by the other surety, or may have been obtained against him, the question still remains whether he is entitled to such security only to the extent of enforcing a claim for that which he has paid on behalf of the co-surety, or whether he may enforce the full claim which the creditor had against the co-surety, provided that he does not himself thus obtain more than he has actually paid on behalf of the co-surety. The latter is the contention of the plaintiff. Upon the inquiry involved, the authorities are certainly conflicting." After reviewing the authorities the learned judge continued: "In this conflict of authority, we are brought to the

[1] Glasscock v. Hamilton, 62 Tex. 143.

[2] New Bedford Institution for Savings v. Hathaway, 134 Mass. 69, 45 Am. Rep. 289. See Bowditch v. Green, 3 Metc. (Mass.) 360. See, however, Apperson v. Wilbourn, 58 Miss. 439; Hess's Estate, 69 Pa. St. 272.

conclusion that neither in his own name nor in that of the creditor ought the surety paying the debt to enforce any claim against his co-surety, except for the amount actually paid by him for his co-surety; and if, by reason of the insolvency of such surety, there is a loss, it is one to which the relation in which they stand to each other compels him to submit."

§ 539. **The fact that one surety has misappropriated property delivered to him by the debtor as collateral security for his liability,** is no defense to an action by the creditor against a co-surety. The creditor having no possession or control of the security in such case, can not be held responsible for a fraudulent conversion of it by the surety.[1]

[1] Prather v. Young, 67 Ind. 480.

CHAPTER XIV.

PAYMENT AND REDEMPTION.

I. *Effect of Payment or Tender of Payment.*

§ 540. **Payment of the debt for which the collateral security was taken discharges the pledge,** and the security will not apply to any new or other indebtedness unless there be an agreement of the parties that it shall so apply.[1] Whether the security be a chattel or a chose in action, the payment of the debt by the pledgor revests in him the beneficial interest, and he becomes again the absolute owner.[2] And payment or tender of payment is the only means whereby the pledgor can by his own act reinvest himself with the right of possession of the pledge.[3]

Anything that effects a satisfaction of the debt is payment.[4] Payment may be made as well by the delivery and acceptance of personal property as by the delivery and acceptance of money. But there must be a substantial satisfaction of the debt in some way in order to discharge the lien. Two notes

[1] Biebinger v. Continental Bank, 99 U. S. 143; National Safe Deposit Sav. & Trust Co. v. Gray, 12 App. Cas. (D. C.) 276; Gilpen v. Leksell, 54 Kan. 674, 39 Pac. Rep. 176; Callanan v. Smart, 60 Iowa 305, 14 N.W. Rep. 328.

[2] Lapping v. Duffy, 65 Ind. 229; Compton v. Jones, 65 Ind. 117; Ward v. Ward, 37 Mich. 253; Merrifield v. Baker, 9 Allen (Mass.) 29; Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51; Gage v. McDermid, 150 Ill. 598, 37 N. E. Rep. 1026; Dupee v. Blake, 148 Ill. 453, 35 N. E. Rep. 867.

[3] Henry v. Eddy, 34 Ill. 508.

[4] Bacon v. Lamb, 4 Colo. 578; Strong v. Wooster, 6 Vt. 536.

were delivered as collateral security for advances to be made under certain contracts made by the pledgee with the indorser. The creditor afterwards brought an action for a final accounting under the contracts, and obtained a judgment, which was satisfied. In this action, claims for advances made upon two drafts, each referring specifically to one of the collateral notes, were rejected because not included in the bill of particulars. Subsequently the creditor brought suit upon the notes, and it was contended that they were merged in the judgment recovered in the action for an accounting; but it was held that they were not so merged; that the obligation of the parties thereto remained until the purpose for which the notes were delivered should be accomplished, namely, the securing the payment of the advances made by the creditor upon the faith of these notes.[1]

The whole debt must be paid in order to discharge the lien of the pledge.[2] In Louisiana the civil code provides that when several things have been pawned the owner can not retake one of these without satisfying the whole debt, though he offers to pay a certain amount of it in proportion to the thing which he wishes to get. The creditor who is in possession of the pledge can only be compelled to return it, when he has received the whole payment of the principal as well as the interest and costs.[3]

But the fact that at the time of the payment of a principal debt of eight thousand dollars, an item of interest amounting to thirty-seven dollars was overlooked by both parties, and part of the collateral security was surrendered by the pledgee to the pledgor, the latter was not precluded from recovering the value of stock not surrendered, but retained by the pledgee as security for another debt. The pledgee did not refuse to deliver the stock in question because this item of interest was

[1] Steele v. Lord, 28 Hun (N. Y.) 27.

[2] Williams v. Nat. Bank, 72 Md. 441, 450, 20 Atl. Rep. 191; Flanagin v. Hambleton, 54 Md. 222.

[3] 2 Merrick's R. Civ. Code 1900, arts. 3163, 3164; R. Civ. Code 1870, p. 376, arts. 3163, 3164.

not paid; and he can not on this ground maintain the defense that the pledgor did not establish a technical conversion of the stock.[1]

§ 541. **A renewal of a note secured by a pledge merely extending the time of payment does not extinguish the debt,** and is not a payment of it which will discharge the creditor's claim upon the collateral security.[2] Upon payment of a part of the original note, and the execution of a new note in renewal of the remainder of the debt not paid, a pledge taken

[1] Kullman v. Greenebaum, 92 Cal. 403, 28 Pac. Rep. 674.

[2] King v. Doane, 139 U. S. 166, 11 S. C. Rep. 465; Jones v. Guaranty & Indemnity Co., 101 U. S. 622; First Nat. Bank v. Bates, 1 Fed. Rep. 702; Case v. Fant, 53 Fed. Rep. 41, 3 C. C. A. 418; Mitchell v. Roberts, 17 Fed. Rep. 776.

Alabama: Woodward v. Echols, 58 Ala. 665; Conner v. Banks, 16 Ala. 42, 52 Am. Dec. 209.

Colorado: Collins v. Dawley, 4 Colo. 138, 34 Am. Dec. 72.

Georgia: Partridge v. Williams, 72 Ga. 807.

Illinois: Worcester Nat Bank v. Cheeney, 87 Ill. 602; Citizens' Nat. Bank v. Dayton, 116 Ill. 257, 4 N. E. Rep. 492; Fairbank v. Merchants' Nat. Bank, 30 Ill. App. 28, 132 Ill. 120, 22 N. E. Rep. 524; Beidler v. Crane, 135 Ill. 92, 25 N. E. Rep. 655; Price v. Dime Sav. Bank, 124 Ill. 317 (Price v. Reed, 15 N. E. Rep. 754).

Indiana. Hawkins v. Fourth Nat. Bank, 150 Ind. 117, 49 N. E. Rep. 957.

Massachusetts: Cotton v. Atlas Nat. Bank, 145 Mass. 43, 12 N. E. Rep. 850; Taber v. Hamlin, 97 Mass. 489, 93 Am. Dec. 113.

Michigan: Shaw v. Clark, 49 Mich. 384, 13 N. W. Rep. 786; Waldron v. Murphy, 40 Mich. 668; Post v. Springsted, 49 Mich. 90.

Minnesota: Balme v. Wambaugh, 16 Minn. 116; Moore v. Norman, 43 Minn. 428, 19 Am. St. Rep. 247, 45 N. W. Rep. 857.

Missouri: Crawford v. Spencer, 92 Mo. 498, 4 S. W. Rep. 713; Comings v. Leedy, 114 Mo. 454, 21 S. W. Rep. 804.

New Hampshire: New Hampshire Sav. Bank v. Gill, 16 N. H. 578.

New York: Holland Trust Co. v. Waddell, 75 Hun 104, 26 N. Y. Supp. 980, affirmed 151 N. Y. 666, 46 N. E. Rep. 1148; Merchants' Nat. Bank v. Hall, 83 N. Y. 338, 38 Am. Rep. 434.

Ohio: Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 208; Patterson v. Johnston, 7 Ohio 225.

Pennsylvania: Shrewsbury Sav. Inst. Appeal, 94 Pa. St. 309; Lytle's Appeal, 36 Pa. St. 131; Boyd v. Conshohocken, 149 Pa. St. 363, 24 Atl. Rep. 287; Girard F. & M. Ins. Co. v. Marr, 46 Pa. St. 504; Laucks v. Michael, 154 Pa. St. 355, 26 Atl. Rep. 314.

Vermont: Pinney v. Kimpton, 46 Vt. 80, 83.

Virginia: Moses v. Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609.

South Carolina: Ratcliff v. Vance, 2 Mill Const. 239.

as security for the original note will stand as security for such new note, in the absence of any agreement to the contrary.[1]

An unexpressed intention of the pledgor that the collateral shall not apply to and secure a renewal of the note secured, which is merely an extension of the time for payment, can not defeat the right of the pledgee to hold the security until the debt is satisfied.[2]

In Massachusetts, however, the rule is that there is a *prima facie* presumption that a note taken in renewal of an antecedent note or debt is received in payment of such prior note or debt.[3] But this presumption may be rebutted by evidence that it was not the intention of the parties that the renewal should have this effect, and this intention may be inferred from proof that, if thus treated, the party taking the new note will have relinquished valuable security, as where a new note is given for an old one secured by a mortgage,[4] or a pledge.

§ 541a. **A substitution of other securities for those originally pledged** does not affect the pledgee's rights except as the new securities are more or less valuable than the old. He holds the new securities in place of those originally taken, and may enforce them and apply the proceeds to the payment of the debt secured.[5]

§ 541b. **Payment may be made by a surrender by the pledgee of the note secured and a transfer of the pledge to him by the**

[1] Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 208.

[2] Williams v. National Bank, 72 Md. 441, 20 Atl. Rep. 191.

[3] O'Conner v. Hurley, 147 Mass. 145, 16 N. E. Rep. 764; Green v. Russell, 132 Mass. 536; Ely v. James, 123 Mass. 36; Stevens v. Wiley, 165 Mass. 402, 407, 43 N. E. Rep. 177.

[4] Bryant v. Pollard, 10 Allen (Mass.) 81; O'Conner v. Hurley, 147 Mass. 145, 16 N. E. Rep. 764.

[5] Sawyer v. Turpin, 91 U. S. 114; Clark v. Iselin, 21 Wall. 360; Tiffany v. Boatmen's Inst., 18 Wall. 375; Greenwell v. Haydon, 78 Ky. 534; Mahaska County State Bank v. Crist, 87 Iowa 415, 54 N. W. Rep. 450; Des Moines Nat. Bank v. Chisholm, 71 Iowa 675, 33 N. W. Rep. 234; Stevens v. Blanchard, 3 Cush. (Mass.) 169; Girard F. & M. Ins. Co. v. Marr, 46 Pa. St. 504; Searight v. Carlisle Dep. Bank, 162 Pa. St. 504, 29 Atl. Rep. 783; Smith v. Hiles-Carver Co., 107 Ala. 272, 18 So. Rep. 37.

pledgor, who can not afterwards redeem the pledge unless the surrender of the pledge was obtained by fraud. Thus, where the pledgee of shares of stock surrendered to the pledgor a paper evidencing the pledge, and also surrendered the notes to secure which the pledge was made, marking them "paid," and the pledgor executed and delivered to the pledgee an absolute bill of sale of the shares, the chancellor will not, in the absence of strong evidence of fraud, set aside the contract and permit the pledgor to redeem.[1]

§ 542. **A tender of the amount due on a debt for which property is held in pledge,** or for which collateral security has been given, no objection being made to the amount or sufficiency, wholly discharges the lien of the pledge, and revests the title to the thing pledged in the pledgor, so as to entitle him to maintain trover, or replevin therefor.[2] In this respect a tender is equivalent to actual payment. A tender of a part of the amount of the debt will not have the effect to revest the title to

[1] Cunningham v. Jones (Ky.), 57 S. W. Rep. 488.

[2] Ratcliff v. Davis, Cro. Jac. 244, Yelv. 178, 1 Bulstr. 29; Coggs v. Bernard, 2 Ld. Raym. 909, Holt 528; Ryall v. Rowles, 1 Atk. 165, 167; Mitchell v. Roberts, 17 Fed. Rep. 776.

California: Latta v. Tutton, 122 Cal. 279, 54 Pac. Rep. 844; Haile v. Smith, 113 Cal. 656, 45 Pac. Rep. 872; Loughborough v. McNevin, 74 Cal. 250, 14 Pac. Rep. 369, 15 Pac. Rep. 773, 5 Am. St. Rep. 435.

Georgia: McCalla v. Clark, 55 Ga. 53.

Massachusetts: Hancock v. Franklin Ins. Co., 114 Mass. 155; Hathaway v. Fall River Nat. Bank, 131 Mass. 14.

Michigan: Moynahan v. Moore, 9 Mich. 9, 77 Am. Dec. 468; Stewart v. Brown, 48 Mich. 383, 12 N. W. Rep. 499.

Minnesota: Norton v. Baxter, 41 Minn. 146, 42 N. W. Rep. 865, 4 L. R. A. 305.

New York: Haskins v. Kelly, 1 Robt. 160, 1 Abb. Pr. N. S. 63; Bowman v. Hoffman, 20 N. Y. Supp. 415; Lawrence v. Maxwell, 53 N. Y. 19; Cass v. Higenbotam, 100 N. Y. 248, 3 N. E. Rep. 189; Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145; Lehmeyer v. Provident Loan Society, 65 N. Y. Supp. 313, 31 Misc. Rep. 719.

Pennsylvania: Rodgers v. Grothe, 58 Pa. St. 414; Davis v. Bigler, 62 Pa. St. 242; Appleton v. Donaldson, 3 Pa. St. 381.

South Carolina: Ratcliff v. Vance, 2 Mill's Const. Rep. 239.

Tennessee: Ball v. Stanley, 5 Yerg. 199, 26 Am. Dec. 263.

Utah: Hyams v. Bamberger, 10 Utah 3, 36 Pac. Rep. 202, 205, quoting text.

any part of the property pledged;[1] the debt must be paid as a whole, and the tender to be effectual must be co-extensive with the whole debt secured.[2]

In one respect a tender is not equivalent to payment; for although the lien is discharged by either, the debt is not discharged by a tender, but the pledgee may still maintain his action for this.

If a pledgor suffers the thing pledged to remain in the possession of the pledgee after tender of payment, and takes no steps to recover possession, he authorizes others to regard the pledge as still subsisting, and he can not recover the thing pledged from an innocent purchaser without paying him the amount secured by the pledge.[3] A pledgor waives his right to treat a tender as a discharge of the lien by bringing an action against the pledgee for money had and received after the latter has sold the pledged property.[4]

§ 543. **A creditor by refusing a tender properly made of the amount of a debt secured by a pledge, converts it to his own use.** He makes it his own so far as to run the chance of any depreciation that may afterwards occur. He can not sue for and recover the debt without making a proper allowance for the value of the pledge as it was at the time of the tender in reducing or satisfying the debt.[5] If in such case there be a surety of the debt, he is released; for the surety is entitled to have the security delivered up to him upon his paying the debt; and when the creditor has by his own act destroyed the security or rendered it valueless, or put it out of his power to give the surety the benefit of the substitution, the latter is discharged.[6]

[1] Appleton v. Donaldson, 3 Pa. St. 381.

[2] Bigelow v. Young, 30 Ga. 121.

[3] Bradley v. Parks, 83 Ill. 169.

[4] Hancock v. Franklin Ins. Co., 114 Mass. 155.

[5] Griswold v. Jackson, 2 Edw. Ch. (N. Y.) 461; affirmed 4 Hill 522; Hyams v. Bamberger, 10 Utah 3, 36 Pac. Rep. 202, 205, quoting text; Hathaway v. Fall River Nat. Bank, 131 Mass. 14; Hancock v. Franklin Ins. Co., 114 Mass. 155; Loughborough v. McNevin, 74 Cal. 250, 14 Pac. Rep. 369, 15 Pac. Rep. 773.

[6] Griswold v. Jackson, 2 Edw. Ch. (N. Y.) 461.

Upon the pledgee's refusal of a tender of the whole amount of the debt secured, the debtor may maintain trover for the property, and he is entitled to damages to the full value of the property, without any abatement for the amount for which the property was pledged. The creditor must resort to an action to recover the debt. The refusal of the tender discharges the lien upon the property and places the parties, in relation to the property, in the same position as if the debt had been paid and no pledge had ever existed.[1]

§ 544. **Upon tender or payment of the specific debt secured by pledge, the creditor has no power over the collateral security except to hold it,** and deliver it to the debtor upon demand. The fact that shares of stock have been pledged to secure a promissory note which provided that the holder might sell the collateral on default, "he giving me credit for any balance of the net proceeds of such sale, and paying all sums then due from me to said holder," does not give the holder any right to retain the stock as security for any other debt after payment or tender of payment of the note.[2] The event upon which the holder was authorized to credit the pledgor with the proceeds of the collateral and to pay therewith other debts due from him, does not occur when payment or tender is made before the creditor exercises his power of sale. Upon payment or tender the pledgor or any one standing in his place is entitled to receive the stock discharged of the lien created by the pledge. The pledgor's assignee in insolvency or his trustee for the benefit of his creditors would be entitled to his rights in such case, so that in an action to redeem the pledged stock, the creditor could not set off other debts due him from the pledgor at the time the note matured.[3] More-

[1] Ball v. Stanley, 5 Yerg. (Tenn.) 199, 26 Am. Dec. 263; Hyams v. Bamberger, 10 Utah 3, 36 Pac. Rep. 202, 205, quoting text; Loughborough v. McNevin, 74 Cal. 250, 14 Pac. Rep. 369; Mitchell v Roberts, 17 Fed. Rep. 776; Norton v. Baxter, 41 Minn. 146, 42 N. W. Rep. 865; Tom Boy Gold Mines Co. v. Green, 11 Colo. App. 447, 53 Pac. Rep. 845.

[2] Hathaway v. Fall River Nat. Bank, 131 Mass. 14.

[3] Hathaway v. Fall River Nat. Bank, 131 Mass. 14; Stetson v. Exchange Bank, 7 Gray (Mass.) 425.

over, it would be no defense to a bill by such assignee that the creditor had applied the pledged stock in payment of other debts due from the pledgor.[1] Cases in which it is held that the damages in trover may be mitigated by proof that the goods converted have been restored to the owner, or their proceeds applied to his use or to payment of his debts, would have no application as against such assignee, because he represents not merely the pledgor but his creditors.

§ 545. **A tender, to have the effect of discharging the lien of a pledge,** must be absolute and unconditional, and must in all other ways conform to the general rules relating to the mode of making a tender. The money need not be actually produced, if the debtor has it ready and offers to pay it, but the creditor dispenses with the production of it in any manner, as for instance, by expressly saying to the debtor that he need not produce the money, as he would not accept it.[2] But a bare refusal to receive the sum offered, and a demand of a larger sum are not enough to excuse an actual tender of the money. Thus, where a debtor met his creditor for the purpose of redeeming stock held in pledge, and the amount due upon it having been agreed upon, the debtor's agent and broker was about to fill up a check for the amount, when the creditor requested that the business should be postponed to the next day, and demanded the whole value of the stock, amounting to much more than the sum liquidated, under the pretense that he was responsible as surety for the debtor, on another and separate account, the tender was held to be ineffectual.[3]

A tender accompanied with a demand for a receipt, or a discharge of a lien or a return of securities, is not an unconditional tender. A tender should not be accompanied with a demand for anything more than the production and delivery of any negotiable paper representing the debt which is sought

[1] Hathaway v. Fall River Nat. Bank, 131 Mass. 14.

[2] Thomas v. Evans, 10 East 101; Kraus v. Arnold, 7 Moore 59; Hancock v. Franklin Ins. Co., 114 Mass. 155.

[3] Dunham v. Jackson, 6 Wend. (N. Y.) 22.

to be paid.[1] Moreover, the tender must at all times be kept good; that is, the debtor must constantly keep on hand the money tendered, separate from his other money, ready to pay over to the creditor whenever he might be ready to take it, and must bring the money into court.[2]

If the pledgee at the time of the tender admits its sufficiency, he can not afterwards object to it on the ground that it was accompanied by conditions to which he was not bound to accede;[3] and he can not afterwards object to the tender on the ground that the sum tendered was insufficient. Thus, if the pledgor makes a tender, and the pledgee does not inform him that the sum is insufficient, and then refuses to deliver the collateral securities on the ground that the sum is insufficient to redeem them, the pledgor is entitled to recover possession of the securities, or a judgment for their value.[4]

Whether a tender after maturity of the debt secured must be kept good, or the money paid into court in order to discharge the lien of mortgage of real property is a question upon which the authorities are not agreed.[5] In some states the rule on this subject is not the same in respect to mortgages of personal property as it is in respect to mortgages of real property, because a mortgage of personal property vests the legal title, while in many states a mortgage of real property is merely a lien. In a pledge the title generally remains in the pledgor, and accordingly it is generally held that a tender need not be kept good in order to discharge the lien.[6]

Although a statute provides that an offer in writing to pay a particular sum of money is, if not accepted, equivalent to the actual production and tender of the money, such a tender does

[1] Cass v. Higenbotam, 27 Hun (N. Y.) 406; Brooklyn Bank v. De Grauw, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569.

[2] Cass v. Higenbotam, 27 Hun (N. Y.) 406.

[3] Barnhart v. Fulkerth, 73 Cal. 526, 15 Pac. Rep. 89.

[4] August v. O'Brien, 61 N. Y. Supp. 720, 30 Misc. Rep. (N. Y.) 54.

[5] See Jones on Mortgages, §§ 892, 893.

[6] Mitchell v. Roberts, 17 Fed. Rep. 776; Loughborough v. McNevin, 74 Cal. 250, 14 Pac. Rep. 369, 15 Pac. Rep. 773; Cass v. Higenbotam, 100 N. Y. 248, 3 N. E. Rep. 189.

not have the effect of an actual tender, unless made in good faith, with the ability to produce the money.[1]

§ 545a. **The tender must be made in good faith** with the intention to make an actual payment of the debt, and the refusal must be without a just and reasonable cause, to have the effect of discharging the lien. Where notes were pledged under an agreement that they should be surrendered on the payment of a sum named, and the pledgor tendered this amount to the attorneys of the pledgee who held the debt secured for collection, but not the notes pledged, the attorneys replied that they had not possession of the notes and could not deliver them. A few days after the pledgee offered to deliver the notes on the payment of the amount named, which was refused. It was held that there was no unreasonable or absolute refusal by pledgee to deliver the notes, nor any offer in good faith by the pledgor to pay them, and that the lien was not lost.[2]

§ 546. **A tender need not include interest upon the debt if none was contracted for,** and none has accrued by way of damages after a demand. Thus, upon a pledge of a watch by way of a sale of it for eighty-two dollars, with an agreement that the seller should have it again in thirty days, upon the payment of eighty-seven dollars, a tender of the latter sum was held sufficient, the five dollars bonus being regarded as in lieu of interest.[3]

§ 547. **Upon the tender of the amount of a debt for which an accommodation note is held as security,** the maker of such

[1] Hyams v. Bamberger, 10 Utah 3, 36 Pac. Rep. 202.

Per Bartch, J.: "Where a person makes a tender in writing, the statute excuses him from actually producing the money at the time of making the tender, but it excuses no other act or requirement on his part which would be necessary to make a valid tender, independently of the statute. To hold otherwise would be to turn the statute, which was intended as a mere convenience into an instrument of fraud to hinder and delay creditors in the collecting of their claims."

[2] Malone v. Wright, 90 Tex. 50, 36 S. W. Rep. 420; Hyams v. Bamberger, 10 Utah 3, 36 Pac. Rep. 202.

[3] Hines v. Strong, 46 How. Pr. (N. Y.) 97; affirmed, 56 N. Y. 670.

note, being in effect a surety, is discharged. The creditor by a tender from the principal debtor has in his hands the means of payment, and by his refusal to accept it discharges the surety; and in an action by the creditor upon the collateral note, the maker of that need not plead the tender, or bring the amount into court.[1]

II. *Application of Payments.*

§ 548. **Where a pledge covers several distinct debts,** contracted at divers times, the moneys arising from the pledge should be applied to the discharge of the debts, in the order in which they were contracted, provided the circumstances are such that neither the debtor nor creditor has the right to determine the application of the proceeds, and the pledge was made in security of the several debts in such a way that the debtor pledged for each debt what remained of the pledge, after payment of the next previous debt[2]

The rule is general that the application should be made upon the oldest unsecured debts, with the exception that if there is a surety upon any debt, the application will first be made upon that debt for the surety's relief.[3]

Where a debtor executed a mortgage to secure a note and advances to be made, and after advances were made, but before maturity, the mortgagee assigned the note as collateral security, and thereafter made an assignment of all his property, including the mortgage, for the benefit of creditors, and the mortgagor delivered to the assignee for creditors' part of the crop covered by the mortgage, which the latter converted into money, the pledgee was entitled to have the money applied on the note in preference to the account for future advances.[4]

[1] Appleton v. Donaldson, 3 Pa. St. 381.

[2] Jones v. Benedict, 83 N. Y. 79, affirming 17 Hun 128, 11 N. Y. Weekly Dig. 428. See Pattison v. Hull, 9 Cow. (N. Y.) 747, and *note*, 777.

[3] Blackmore v. Granbery, 98 Tenn. 277, 39 S. W. Rep. 229; Pardee v. Markle, 111 Pa. St. 548, 555, 5 Atl. Rep. 36, 56 Am. Rep. 299; 2 Daniel on Negotiable Instruments, § 1252.

[4] Walton v. Davis, 114 N. C. 104, 19 S. E. Rep. 159.

"There are, however, well considered cases holding that the creditor may, in the absence of appropriation by the debtor, apply moneys received upon foreclosure of collaterals given by the debtor to secure two or more debts upon the otherwise unsecured debt, on the ground that he is entitled to the benefit of all his securities."[1]

§ 548a. **Where a pledge secures two notes of the same date, one of which is better secured than the other,** the pledgee has a right in the absence of any modifying agreement to have the collateral applied upon the obligation which is most precarious by reason of being least secured.[2]

§ 549. **A general payment may be applied by the creditor as he may determine.** A creditor holding security for various notes of his debtor, some of which bear the names of sureties, may apply general payments, or sums of money received from the security, to the payment of such of the notes as may be necessary for his own protection; and the sureties upon other notes can not avail themselves of the security in any way, without paying or tendering the whole amount of the debts for which the security was given.[3]

§ 550. **The proceeds of the property pledged must be applied in the first instance to the payment of the debt secured.**[4] If a pledgee assign the pledge to secure a debt of his own, he

[1] First Nat. Bank v. Finck, 100 Wis. 446, 453, 76 N. W. Rep. 608, per Winslow, J., citing Small v. Older, 57 Iowa 326, 10 N. W. Rep. 734; Wilson v. Allen, 11 Ore. 154, 2 Pac. Rep. 91; California Nat. Bank v. Ginty, 108 Cal. 148, 41 Pac. Rep. 38; Mathews v. Switzler, 46 Mo. 301. See, also, Wood v. Callaghan, 61 Mich. 402, 28 N. W. Rep. 162; Morrison v. Citizens' Nat. Bank, 65 N. H. 253, 20 Atl. Rep. 300; Northern Nat. Bank v. Lewis, 78 Wis. 475, 47 N. W. Rep. 834.

[2] California Nat. Bank v. Ginty, 108 Cal. 148, 41 Pac. Rep. 38; Murdock v. Clarke, 88 Cal. 384, 26 Pac. Rep. 601; Field v. Holland, 6 Cranch 8; Wood v. Callaghan, 61 Mich. 402, 28 N. W. Rep. 162, 1 Am. St. Rep. 597; Morrison v. Citizens' Nat. Bank, 65 N. H. 253, 20 Atl. Rep. 300, 23 Am. St. Rep. 39.

[3] Wilcox v. Fairhaven Bank, 7 Allen (Mass.) 270; Richardson v. Washington Bank, 3 Met. 536; Fall River Nat. Bank v. Slade, 153 Mass. 415, 26 N. E. Rep. 843; Titcomb v. McAllister, 81 Me. 399, 17 Atl. Rep. 315.

[4] Marziou v. Pioche, 8 Cal. 522; Farnsley v. Anderson Foundry & Mach. Works, 90 Ind. 120.

can not provide that the assignee shall apply the proceeds of the pledge in the first instance to the payment of the pledgee's debt, for the assignment is necessarily subject to the lien of the original debt secured by the pledge, and the pledgee can not change the appropriation except with the consent of the debtor.[1]

The proceeds of collaterals pledged to secure a specific debt can only be applied to the payment of that debt.[2]

A pledge of bonds to a bank as security for loans to an individual, the agreement specifying that they are collateral security for certain demand notes "and of any and every other indebtedness or liability, due or to become due, which may exist on my part to the bank," can not be retained as security for indebtedness to the bank of a firm of which such depositor was a member, or for payment of a note of a third person indorsed by the depositor.[3]

§ 550a. **A creditor holding security pledged by his debtor, and also the debtor's note indorsed by another** for his accommodation with the creditor's knowledge, must apply the proceeds of the securities belonging to the debtor to the payment of his debt, before property of the accommodation indorser which had come into the pledgee's hands can be used for that purpose.[4]

[1] Ware v. Otis, 8 Me. 387.

[2] First National Bank v. Finck, 100 Wis. 446, 76 N. W. Rep. 608; Atherton Co. v. Ives, 20 Fed. Rep. 894; First Nat. Bank v. Scott, 123 N. C. 538, 31 S. E. Rep. 819; Walton v. Davis, 114 N. C. 104, 19 S. E. Rep. 159; Stowe v. First Nat. Bank, 1 Ohio C. C. 524; Metz v. Commercial Bank, 45 S. C. 216, 23 S. E. Rep. 13; San Antonio Nat. Bank v. Blocker, 77 Tex. 73, 13 S. W. Rep. 961; James's Appeal, 89 Pa. St. 54; Loew v. Austin, 140 Pa. St. 41, 21 Atl. Rep. 240; Loyd v. Lynchburg Nat. Bank, 86 Va. 690, 11 S. E. Rep. 104; Bacon v. Bacon, 94 Va. 686, 27 S. E. Rep. 576; Wyckoff v. Anthony, 90 N. Y. 442; Duncan v. Brennan, 83 N. Y. 487; Continental National Bank v. Bell, 125 N. Y. 38, 25 N. E. Rep. 1070; Armstrong v. McLean, 153 N. Y. 490, 47 N. E. Rep. 912, reversing 92 Hun 397; Tenant v. Dudley, 68 Hun (N.Y.) 225, 22 N. Y. Supp. 876; Hughes v. Hunner, 91 Wis. 116, 64 N. W. Rep. 887; Reynes v. Dumont, 130 U. S. 354, 9 S. C. Rep. 486; Haldeman v. German Security Bank, 19 Ky. L. Rep. 1691, 44 S. W. Rep. 383.

[3] Fullerton v. Chatham National Bank, 17 Misc. Rep. (N Y.) 529, 40 N. Y. Supp. 874.

[4] Goodwin v. Massachusetts Loan & Trust Co., 152 Mass. 189, 25 N. E. Rep. 100.

The pledgee must either account for the pledged property by restoring it to the pledgor or showing the application of the proceeds of such property to the debt secured. It is presumed that the thing delivered to the pledgee as security either remains in his possession or has been disposed of for his benefit.[1]

§ 550b. **A pledge of the surplus after satisfying the principal debt, in case recourse is had to the collateral security, is conditional upon a sale of such security.** A promissory note secured by collaterals provided that "if recourse is had to the collaterals, any excess of collaterals upon this note shall be applicable to any other note or claim held by said holder against the maker or makers hereof." It was held that "recourse to collaterals" meant an actual sale thereof, and that where notice of an intention to sell had been given, but by agreement the sale had been postponed, a tender of the amount due on the note before the sale took place superseded the authority to sell, and redeemed the collaterals, leaving no right to have any excess in their value applied on other claims. The supreme court of Wisconsin so deciding said: "The law regards the right of redemption with favor, and it would seem that it can not well be doubted but that the pledgor in this case might lawfully redeem the pledge at any time before actual sale; that by the recourse mentioned in the note was intended an efficient resort to the collaterals by sale for the purpose of realizing their value, with a view to a proper application of the same to the debts of the makers; and it would seem clear that a mere notice of intention to exercise the power of sale could not be considered as an actual or efficient recourse or resort to the collaterals for any real or practical purpose. Mere notice of an intention to sell could not of itself be attended by any legal consequences, and the mere declaration of an intention to sell, wholly unexecuted, can not properly be considered as a resort to them for any cause or purpose, particu-

[1] Detroit Motor Co. v. Third Nat. Bank, 111 Mich. 407, 69 N. W. Rep. 726.

larly when, by mutual consent of the parties, the proposed sale at the time specified was wholly abandoned, and a different time was specified or agreed on. We think it would be harsh and inequitable to hold that a notice thus given, and not pursued, but really abandoned, presumably to allow the pledgor time and opportunity to save his property from sacrifice, can with any propriety or justice be characterized or considered as an actual practical recourse or resort to the collaterals, and that a tender before the second time designated for the sale of the collaterals would not be held sufficient to defeat or prevent the exercise of the power of sale."[1]

§ 551. **A creditor has no right to apply collateral security for any purpose other than that for which it was specially given.**[2] Thus an agent having procured a discount of his principal's note secured by another larger note belonging to his principal as collateral, the creditor upon the maturing of the collateral note, before the principal note, applied the proceeds of it to take up a note made by the agent's firm. Although the agent when obtaining the discount told the creditor to collect the collateral note and credit the proceeds to his firm, the creditor, knowing when he discounted the note that the collateral note was the property of the principal, or at any rate knowing enough to put him upon inquiry, had no right to apply such note otherwise than for the principal's benefit. The collection, therefore, of the collateral note, operated as payment of the principal's note upon the maturity of that, and made the pledgee the debtor to the principal for the difference between the two notes.[3]

An agent who has obtained a loan for his principal upon a pledge of goods belonging to the latter, can not, in the absence of a special agreement, appropriate the proceeds of a sale of the goods to the payment of a debt due to himself by the principal.[4]

[1] Winkler v. Magdeburg, 100 Wis. 421, 428, 76 N. W. Rep. 332.

[2] Phillips v. Thompson, 2 Johns. Ch. (N. Y.) 418, 7 Am. Dec. 535.

[3] Geffcken v. Slingerland, 1 Bosw. (N. Y.) 449.

[4] James's Appeal, 89 Pa. St. 54.

§ 551a. **Whether the application by the pledgee of the proceeds of collateral securities to the principal debt constitutes a part payment which interrupts the statute of limitations,** is a question upon which there is an able opinion of the supreme court of Minnesota, announced in a recent case, holding that such application does not interrupt the statute of limitations, said: "The principle upon which part payment of a debt will take a case out of the statute is that such payment amounts to an acknowledgment of the existence of the debt, from which the law implies a new promise to pay the balance. To have that effect, the payment must be voluntarily made by the debtor in person who is sought to be charged with the effect of it, or by some one authorized by him to make a new promise on his behalf. It has been held, or at least intimated, in some cases, that a sale of collaterals made within a reasonable time after they are deposited with the creditor, and the application of the proceeds on the debt, will act as a part payment at the date of the receipt of such proceeds, so as to interrupt the operation of the statute. This doctrine rests upon the mistaken idea that the creditor is thereby made the agent of the debtor for the collection or sale of the collaterals, ignoring the fact that the creditor can not be made the agent of the debtor to such an extent as to make an act done by him operate as a new promise to himself, without which element a payment can never operate to remove the bar of the statute.[1]

The pledgee's right to receive the proceeds of the collateral mortgages, and apply them in part payment of defendant's note, was acquired under and by virtue of the contract made at the time the collaterals were transferred to him. His subsequent exercise of that right was not a voluntary payment made by the defendant from which a promise to pay the residue can be inferred. The fact that he made no objection when informed by the pledgee that he had applied the proceeds of these collaterals on his note could not take the case out of the statute. He had no reason to object, and, if he had done so,

[1] Wood Lim. Act, § 101.

it would have been futile. The pledgee had merely exercised a contract right, which he acquired when the pledge was made. The pledgor's passive acquiescence in the exercise of that right constituted neither a voluntary payment as of that date, nor a new promise in writing to pay the balance of the debt.[1]

"Some of the cases may be misleading for the reason that they seem to lay some stress on the fact that the debtor never knew of, and consequently never assented to, the application by the creditor of the proceeds of the collaterals. If the debtor had any option in the matter, or any power to object effectively to the application, there would be some force in the suggestion that his assent to it amounted to a voluntary payment by him as of that date. But this can not be so where the creditor is merely exercising an absolute legal right under the original contract."[2]

§551b. **But if the sums collected by the pledgee from the collateral securities are, by understanding with the pledgor, to be applied in payment of the debt as they are collected,** such collections are to be regarded as payments as of the date and at the time they are received, so as to take the debt out of the statute of limitations. In the absence of such an understanding, the money received by a pledge upon collaterals is to be held upon the same terms that the collateral is held. If the debt is payable at a definite time, no application of collections from the collateral securities can be made until that time arrives; and if it is payable on demand, a demand of the debtor must be made before applying the proceeds to the debt secured.[3] If, however, it is agreed or understood that the amounts collected from the collaterals are to be applied in payment of the debt as they are received, such application takes the balance of the debt out of statute of limitations. "In order

[1] Citing Harper v. Fairley, 53 N. Y. 442; Smith v. Ryan, 66 N. Y. 352, 23 Am. Rep. 60; Brown v. Latham, 58 N. H. 30, 24 Am. Rep. 568.

[2] Wolford v. Cook, 71 Minn. 77, 78, 73 N. W. Rep, 706, per Mitchell, J. See, also, Porter v. Blood, 5 Pick. (Mass.) 54; Roscoe v. Hale, 7 Gray 274; Brown v. Latham, 58 N. H. 30, 24 Am. Rep. 568.

[3] § 665, *post*.

that part payment of a debt shall lead to the inference that it is at that time an acknowledgment of the debt which revives the original promise of payment, it is not necessary that such payment should be made by the debtor personally. It is sufficient that it be made by his direction and authority, and it takes effect from the time when it is thus made. Where a debtor deposits with his creditor notes, accounts, etc., against third persons, not in satisfaction of his debt, but as collateral security therefor, to be applied in payment of the debt as the same may be collected, if the creditor acts in good faith and with reasonable expedition when he realizes thereon, his collections are to be regarded as payment by the principal as of the date and at the time when they are received.'"[1]

III. *Redemption in Equity and at Law.*

§ 552. **In general.**—When personal property is conveyed as security by way of mortgage, the legal title passes to the creditor, and his title becomes absolute at law upon breach of the condition. The debtor has no legal right to redeem, and it is only in equity that he can be relieved from the forfeiture and allowed to redeem. He has no legal right to redeem unless such a right be given by statute.[2] But in case of a pledge, as has already been noticed, the pledgor does not part with the general title, but only with the possession and a special property. Upon default the debtor still retains the general title. The property is not conveyed upon a condition that the conveyance shall be void upon performance of the condition. There is no conveyance of the thing pledged, and no condition upon the breach of which the property becomes absolute in the creditor. Therefore the debtor has a legal right to re-

[1] Buffinton v. Chase, 152 Mass. 534, 538, 25 N. E. Rep. 977, per Devens, J., citing Porter v. Blood, 5 Pick. (Mass.) 54; Brown v. Tyler, 8 Gray (Mass.) 135; Whipple v. Blackington, 97 Mass. 476; Hancock v. Franklin Ins. Co., 114 Mass. 155; Butler v. Price, 115 Mass. 578; Haven v. Hathaway, 20 Me. 345.

[2] Jones on Chattel Mortgages, § 683.

deem, although he has not paid the debt secured at its maturity, or otherwise performed the conditions of his contract. His assignee in bankruptcy or for the benefit of creditors, may likewise redeem.[1] Upon his decease his administrator may redeem.[2]

§ 553. **A right of redemption attaches to every pledge.** This right is a part of the contract, whether it be express or implied; and the parties can make no valid agreement that there shall be no redemption after default. "Once a mortgage always a mortgage," is one of the most important maxims in the law of mortgages.[3] With a change of terms it is equally applicable in the law of pledges. "The right of redemption attaches equally to both, and it is as difficult to transmute the one as the other into a sale, by the operation of the original contract. Though anciently at Rome, the creditor and debtor were permitted, by the *lex commissoria*, to make an agreement at the date of the pledge whereby it would, on a prescribed contingency, become the absolute property of the pawnee; such a power was not indulged, even at Rome, since the days

[1] Durfee v. Harper, 22 Mont. 354, 56 Pac. Rep. 582.

[2] Chambers v. Kunzman (N. J. Ch.), 45 Atl. Rep. 599.

[3] Jones on Mortgages, §§ 7, 340; Clark v. Henry, 2 Cow. (N. Y.) 324; Hughes v. Johnson, 38 Ark. 285; Hart v. Burton, 7 J. J. Marsh. (Ky.) 322; Baldwin v. Bradley, 69 Ill. 32, 36; Peugh v. Davis, 96 U. S. 332.

"By the early Roman law, the debtor and creditor might agree that if the debtor did not pay the debt within a time specified, the thing pledged should be forfeited and become the absolute property of the creditor. But a law of Constantine prohibited such contracts, on the ground that they were unjust and oppressive to debtors; and declared that every contract should be null and void which provided that the thing pledged should pass to the creditor without sale or appraisement, or that the debtor should forfeit his right of redemption if he failed to pay at the proper time. Cod. lib. 8, tit. 35, 1, 3. This law of Constantine prohibiting such contracts, has been imported into the law of France (Poth. Nantissement, 18), and into the modern law of Continental Europe. The creditor can not stipulate that if he is not paid at the time appointed, the thing pledged shall become his own property, for such an agreement would be *contra bonos mores;* for the pledge is given to the creditor only as a security for the debt, and not to enable him to profit by the indigence of his debtor. Domat, lib. 3, tit. 1, §§ 3, 11;" Folkard's Law of Pawnbrokers, p. 11, n. f.

of Constantine, who abolished the law by which it had been sanctioned. Every agreement for preventing redemption of pawns is proscribed by the common law as emphatically as are similar agreements in mortgages of real estate."[1] Therefore, if in a written or verbal contract of pledge it is stipulated that the property shall be absolutely the property of the pledgee, if the debt be not paid at a time stipulated, the right to redeem exists, notwithstanding the agreement of the parties. The law recognizes no agreement to prevent a redemption of the pledge. Any contract which is a pledge in the beginning continues a pledge until the debt is paid or the right of redemption is foreclosed. The parties may, by a subsequent agreement for a valid consideration, release the right of redemption; but they can not in the original contract agree that no right of redemption shall attach to it. Thus, a stipulation made by a mortgagee in the assignment of a mortgage as collateral security, that he shall forfeit all interest in it if he fail to pay his debt at maturity, does not cut off his right to redeem it afterward.[2]

§ 554. **An agreement by a pledgor that the property pledged shall become the pledgee's absolutely** upon his failure to pay the debt at the time specified, will not be enforced; but in a suit by the pledgee to recover the principal debt he will be held to account for the proceeds of the property pledged, if this has been sold.[3] Moreover, the pledgor, upon a tender of the full amount of the debt, may, in replevin, recover the thing pledged, or may recover its value in action of trover; or in exceptional cases may maintain bill in equity to redeem.[4]

A creditor holding notes of third persons as collateral

[1] Hart v. Burton, 7 J. J. Marsh. (Ky.) 322, 323, per Robertson, C. J. And see Wadsworth v. Thompson, 8 Ill. 423, 427; Marshal v. Williams, 2 Hayw. (N. C.) 405; Luckett v. Townsend, 3 Tex. 119, 49 Am. Dec. 723; Hughes v. Johnson, 38 Ark. 285.

[2] Hughes v. Johnson, 38 Ark. 285.

[3] Dorrill v. Eaton, 35 Mich. 302; Kingsbury v. Phelps, Wright (Ohio), 370; Clark v. Henry, 2 Cow. (N. Y.) 324; Vickers v. Battershall, 84 Hun (N. Y.) 496, 32 N. Y. Supp. 314, 65 N. Y. St. Rep. 470; Ritchie v. McMullen, 79 Fed. Rep. 522, 168 U. S. 710.

[4] Stoker v. Cogswell, 25 How. Pr. (N. Y.) 267.

security must account for them or their proceeds, although his debtor has agreed with him, that if the debt be not paid at a specified time, the collateral notes shall become his absolutely. If the creditor in such case brings suit upon the principal debt, recover judgment and collect it in full, and, pending the suit or afterwards, he sells the collateral notes, and fails to account for their proceeds to the debtor, the latter may recover the same of the creditor. "Courts of law as well as of equity very frequently refuse to carry out the express agreements of parties where the result would be gross injustice to one, without any corresponding loss to the other, calling for such injustice. Especially should this be the case where an agreement made between mortgagor and mortgagee, or borrower and lender, is sought to be enforced or interposed as a defense. The law should and does scrutinize closely all such agreements, and refuses to enforce them, especially where, as in this case, to do so would be both unjust and unconscionable.'"[1]

§ 555. **The parties may at a time subsequent to the pledge agree that the creditor shall take the pledge in satisfaction** of the debt, and their contract to this effect, if clearly proved, will be enforced. They may also agree that the creditor may sell the property pledged at a stipulated price, or may himself take the property at that price and credit the pledgor with the amount. But to prevent a redemption there must be clear and satisfactory proof not only of the contract itself, but of the creditor's election to take the property at the price agreed upon, either by his giving personal notice of such election, or by his crediting the amount upon his books. A mere resolution in the creditor's own mind to take the opportunity is not sufficient. The appropriation must be such that the debtor could have availed himself of it.[2]

Such an arrangement, moreover, will not be sustained if the creditor has made any fraudulent or oppressive use of his position and power over the debtor.

[1] Dorrill v. Eaton, 35 Mich. 302.

[2] Beatty v. Sylvester, 3 Nev. 228.

§ 556. **In general a bill in equity does not lie to redeem property from a pledgee,** because the remedy at law upon a tender of the money is ample;[1] the remedy at law being either a possessory action to recover the thing pledged, or an action of trover to recover its value.[2]

A special ground for proceeding in equity must be shown, as that a discovery is necessary or that an account is wanted, or that there has been an assignment of the pledge.[3]

Thus, if the pledgee is insolvent and has transferred the pledge to another who resides without the state, a court of equity will intervene for the relief of the pledgor, and upon proper bill filed compel a restoration of the pledge.[4]

§ 557. **A bill in equity may be maintained to redeem a pledge, if an account is wanted,** or if there has been an assignment of the pledge, notwithstanding the pledgor has a remedy at law, in an action of trover.[5] But if the ground be the necessity of an account, the account must be a real one; that is, there must be a series of transactions on both sides, and not merely one item on one side and a number of set-offs on the other.[6]

If the pledge secures a money account of such a nature that

[1] Roland v. Lancaster County Nat. Bank, 135 Pa. St. 598, 19 Atl. Rep. 951; Doak v. Bank of the State, 6 Ired. (N. C.) 309; Durant v. Einstein, 5 Robt. (N. Y.) 423, 35 How. Pr. 223; Genet v. Howland, 45 Barb. (N. Y.) 560; Flowers v. Sproule, 2 A. K. Marsh. (Ky.) 54, 56.

[2] Nelson v. Owen, 113 Ala. 372, 376, 21 So. Rep. 75.

[3] Kemp v. Westbrook, 1 Ves. 278; Story Eq. Juris., § 1032; Hasbrouck v. Vandervoort, 4 Sandf. (N. Y.) 74.

[4] Nelson v. Owen, 113 Ala. 372, 21 So. Rep. 75, quoting text, and citing Pollak v. Janney, 100 Ala. 561, 13 So. Rep. 661; White Mountain R. Co. v. Bay State Iron Co., 50 N. H. 57; Hasbrouck v. Vandervoort, 4 Sandf. (N. Y.) 74.

In *Colorado*, without showing any special ground for proceeding in equity, an equitable action was maintained to redeem a pledge, and the court ordered the pledgee who was in possession of the pledged property to deliver it to the pledgor, instead of merely giving a judgment for possession. Colburn v. Riley, 11 Colo. App. 184, 52 Pac. Rep. 684.

[5] Kemp v. Westbrook, 1 Ves. 278; Vanderzee v. Willis, 3 Bro. Ch. 21; White Mountains R. v. Bay State Iron Co., 50 N. H. 57; Merrill v. Houghton, 51 N. H. 61; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62, 100, per Chancellor Kent.

[6] Durant v. Einstein, 35 How. Pr. (N. Y.) 223, 5 Robt. 423.

the debtor would not be presumed to know the amount of his indebtedness, it is not essential that he should tender the amount before filing a bill to redeem. In fact, in such case, to obtain an accounting is one of the objects of the bill, and it is sufficient if the debtor proffers to pay whatever is found due on such accounting.[1]

Where a corporation has pledged all its stock to secure the debt of a stockholder who practically controls the corporation, the equitable owner of a part of such stock may maintain a bill in behalf of the corporation as well as in his own behalf to redeem the stock, and such suit is not subject to the objection that it divides the claims against the pledgee.[2]

Where the pledge secures an open account it is not essential that the pledgor should make a tender before filing his bill to redeem. It is sufficient for him to demand the items of his account, and show himself willing to pay whatever is found due. The offer of redemption in his bill is sufficient.[3]

Where the debt secured by a pledge was by agreement to have been determined at the time of the transaction, but was left undetermined and remained so when a bill in equity to redeem was brought, it was held that there was a good ground for equitable relief; and it does not matter that the pledgor has made a tender to redeem the pledge and the pledgee has refused the tender. In such a case the court of appeals of New York said: "There can be no doubt that a sufficient cause of action in equity is stated in the complaint. To turn the bill of sale into a collateral security merely, and then to redeem the pledge upon payment of the debt to be ascertained by an accounting, is clearly proper subject-matter for an equitable action. But the appellant principally relies upon the contention that the complaint discloses on its face the fact that plaintiff has an adequate remedy at law, and so there is no ultimate right to equitable relief. The claim is that, having tendered eighteen hundred dollars and demanded a return of the goods, he may

[1] Beatty v. Sylvester, 3 Nev. 228.

[2] Higgins v. Lansingh, 154 Ill. 301, 40 N. E. Rep. 362.

[3] Beatty v. Sylvester, 3 Nev. 228; Stapp v. Phelps, 7 Dana (Ky.) 296.

sue at law and recover the embroideries (the goods pledged) by a replevin. That remedy would, perhaps, be adequate if there was no question about the amount of the debt, but is certainly not adequate where the amount is in dispute and wholly uncertain. The plaintiff was not bound to peril his whole right by an adoption of the legal remedy, but was at liberty to redeem in equity where an accounting could be had and the ascertained debt be paid.'"[1]

§ 558. **Where the property pledged is stock in a corporation,** and the shares have been transferred upon the books of the company to the name of the pledgee so that he has the legal title, equity alone can restore possession of the shares to the pledgor, by an order for redelivery. The transaction is a pledge, although the legal title passes to the pledgee; but it partakes of the nature of a mortgage, and it would seem that the remedy for redemption should be the same as upon mortgages. If the pledgor seeks for an account of receipts and dividends, although the law could afford a remedy by assumpsit for these alone, equity has also jurisdiction, and more particularly where the relief could not be obtained at law except by a multiplicity of suits.[2]

When stock is held as collateral security for an anticipated loss upon a mortgage not yet foreclosed of a house, upon a bill to redeem the stock, the court, in order to ascertain the amount of such loss, will order the house to be sold, unless the pledgee will accept the decision of a master as to the value.[3] The pledgor in such case having authorized the pledgee to let the mortgaged house until it should be sold, but never afterwards having requested him to sell it, the pledgee is not guilty of laches by waiting more than five years without selling it. Such delay does not show an election on his part to take the prop-

[1] Castoriano v. Dupe, 145 N. Y. 250, 252, 39 N. E. Rep. 1065, 64 N. Y. St. Rep. 688, per Finch, J.

[2] Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69, 29 Md. 473; Hasbrouck v. Vandervoort, 4 Sandf. (N. Y.) 74.

[3] Bartlett v. Johnson, 9 Allen (Mass.) 530.

erty for his own, at its cost, and to waive all claim against the pledgee for the loss.[1]

§ 559. **It has also been held that a court of equity may compel a specific delivery to the pledgor** of a note or mortgage held in pledge after the debt secured has been paid, on the ground that the pledgee's retention of the property is in violation of a trust.[2] But such a proceeding in equity is exceptional in practice and questionable in principle, because full compensation for a failure or refusal to surrender the property pledged after payment of the debt secured can be had in a suit at law, except in case the pledge be an ornament or heir-loom having a special value to the owner, for the loss of which damages in money would be no adequate compensation.

§ 560. **Upon the death of the pledgor, his right to redeem may be enforced by his representatives;** and, on the other hand, upon the death of the pledgee the pledgor may enforce his right of redemption against the pledgee's representatives.[3]

§ 560a. **Upon redemption a pledgee is entitled to charge payments he has made to keep the pledge alive.** If a policy of insurance is pledged as security for the debt of the assured, and the pledgee pays the premiums in order to keep the policy alive, the beneficiary, who joined with the assured in pledging the policy, is entitled to redeem the policy only upon paying, in addition to the amount of the debt with interest thereon, the amount of the premiums paid by the pledgee, with interest

[1] Bartlett v. Johnson, 9 Allen (Mass.) 530.

[2] Brown v. Runals, 14 Wis. 693. By the Court, Cole, J.: "Where a party obtains possession of chattels through some trust or fiduciary relation to the owner, and then attempts to hold the possession wrongfully, a court of equity may entertain a suit for specific delivery of the thing withheld. The subject of trusts is a matter peculiarly of equitable cognizance, and we suppose a pledge of personal property creates a trust in respect to such property. The pledgee has a right to retain and hold the property pledged until his debt is paid, and then he is bound to restore it to the pledgor. Thus a fiduciary relation is created between the parties in respect to the pledge, from which arise various obligations and duties."

[3] Cortelyou v. Lansing, 2 Caines Cas. 200.

from the time of each payment; and such beneficiary is not obliged to pay interest on the amount of the premiums so paid, at the rate of two per cent. a month where this is the rate stipulated to be paid by the pledgor on the debt secured.[1]

The pledgee may also deduct expenditures for taxes and for removing liens upon the property so as to protect the title, and for reasonable expenses in the care of the property.[2]

If a plaintiff in a bill to redeem shares of stock pledged as collateral security for two several liabilities sets forth and offers to pay only one of them, so that an amendment is necessary before the bill can be maintained, he can have no costs up to the time of the amendment; and if the defendant has wrongfully denied the plaintiff's right to redeem on any terms, he should have no costs up to the same time.[3]

IV. *Action for Conversion by the Pledgee.*

§ 561. **An action to redeem the pledge is not the pledgor's only or usual remedy** for the recovery of it after payment or tender. He may sue in trover for a conversion of it, and this is the more usual and the better remedy when the pledgee either refuses to return it upon demand or has willfully disposed of it so as to put it out of his power to return it.[4] "Whatever rights the pledgee may have during the continuance of his special property, when the obligation is discharged and the property released, the pledgor is entitled to the thing pledged. When the special property of the bailee ceases, the general owner may have his property, and if it has been converted by

[1] Kendall v. Equitable Life Assur. Soc., 171 Mass. 568, 51 N. E. Rep. 464.

[2] Furness v. Union Nat. Bank, 147 Ill. 570, 35 N. E. Rep. 624.

As to counsel fees paid for protecting the title to the property, see Work v. Tibbits, 87 Hun (N. Y.) 352, 34 N. Y. Supp. 308.

[3] Bartlett v. Johnson, 9 Allen (Mass.) 530.

[4] Luckey v. Gannon, 37 How. Pr. (N. Y.) 134, 1 Sweeny 12; Campbell v. Parker, 9 Bosw. (N. Y.) 322; Flowers v. Sproule, 2 A. K. Marsh. (Ky.) 54; Niles v. Edwards, 90 Cal. 10, 27 Pac. Rep. 159; Loughborough v. McNevin, 74 Cal. 250, 14 Pac. Rep. 369, 15 Pac. Rep. 773.

the bailee, or lost through his default or neglect, trover will lie. The right to use as well as the right to retain the pledge ceases the instant the lien is discharged by the tender or payment of the debt, or the performance of the covenant or engagement for which the security is given.'"[1]

There may be a conversion of a chose in action which has been pledged, as well as a conversion of a corporeal chattel, and trover will lie for such conversion.[2]

After a suit for a conversion of securities and a recovery in such action, the pledgor can not maintain an action to recover possession of the securities. He has made an election of his remedies and is bound by such election.[3]

§ 562. **Trover may be maintained for the conversion of bank bills specially pledged.** During the civil war a customer of a bank in South Carolina left with the bank four thousand dollars in its own bills as security for the return of a like sum in confederate treasury notes, borrowed for a short limited time. Within this time he tendered this sum in treasury notes, and demanded the return of the bank bills, and upon refusal of the bank to deliver them brought trover for their conversion. It was held that his right to recover was not prejudiced by the fact that the property pledged was money, or the bills of the bank itself; but that the same principle was to govern as if the article deposited had been a watch or a jewel.[4]

§ 563. **A sale by a pledgee for non-compliance with a demand which he has no right to make,** or after tender of the debt actually due, is a conversion. Thus, a broker having purchased gold for a customer upon a pledge of bank stock as collateral security, the customer gave an absolute order to the

[1] Lawrence v. Maxwell, 53 N. Y. 19, per Allen, J.; Iler v. Baker, 82 Mich. 226, 46 N. W. Rep. 377.

[2] Campbell v. Parker, 9 Bosw. (N. Y.) 322; Luckey v. Gannon, 37 How. Pr. (N. Y.) 134, 1 Sweeny 12; Decker v. Mathews, 12 N. Y. 313; Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 269.

[3] Deitz v. Field, 10 App. Div. 425, 41 N. Y. Supp. 1087.

[4] Abrahams v. South Western R. R. Bank, 1 S. C. 441, 7 Am. Rep. 33, Willard, J., dissenting.

broker to sell the gold at a stipulated price, at which it might have been sold; but the broker, claiming the order to be discretionary, failed to do so, and the gold was subsequently sold for a less price; the customer thereupon tendered the broker a sum sufficient to pay the balance of the account, if the gold had been sold in pursuance of his order. After such tender the broker sold the bank stock. It was held that this was a conversion of the stock, and that the customer was entitled to recover its value after deducting the actual indebtedness for which the stock stood in pledge.[1]

If one delivers cattle to another to be kept and fed, with power to sell them to pay for their keeping, the pledgee has the right to sell only so much of the stock as is necessary to pay what may be due him for the keeping and feeding, and if he proceeds to sell all of them, when this was not necessary to pay the expense of such keeping, it is a conversion of the portion of the stock sold by him which was not necessary to pay the debt due for keeping, for which trover will lie.[2]

§ 564. **A pledge obtained by false representations of the creditor vests no title in him,** and the pledgor may recover it without redeeming it by paying the debt. The pledgee is liable as for a conversion of the property in such case if he does not surrender it upon demand. The contract, though perfect in form, being obtained by fraudulent means, is void in law. The omission of the pledgor to make inquiries as to the truth of the representations, can not be imputed to him as negligence, and is no defense to his recovery of the pledge by such false representations.[3]

§ 565. **A principal is liable for a misappropriation of negotiable collaterals by his agent,** through whom the transaction was made. The test of the principal's liability in such a case is found in the answer to the inquiry, whether the fraudulent act of the agent was done in the course of his agency, and by

[1] Hope v. Lawrence, 1 Hun (N. Y.) 317.

[2] Whitlock v. Heard, 13 Ala. 776, 48 Am. Dec. 73.

[3] Mead v. Bunn, 32 N. Y. 275.

virtue of his authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent. If the agent misappropriates collateral security which he has possession of by virtue of his agency, his principal is liable for his fraudulent act.[1]

§ 566. **A conversion of the pledge occurs immediately upon the creditor's refusal of a proper tender** of the debt upon the day of its maturity or afterwards.[2] To lay the foundation for an action for conversion of a thing pledged as security for a debt payable on a fixed day, the debtor's tender and demand should be made on the day of the maturity of the debt, though a tender and demand made after default would be sufficient to enable the pledgor to redeem.[3] But if the tender as made is insufficient, or does not include lawful charges upon it paid by the creditor, such, for instance, as an assessment rightfully paid by the creditor upon stock which is the subject of the pledge, a refusal of the tender does not constitute a conversion, especially if the creditor offer to accept the tender and restore the pledge, if the charges upon it be also paid.[4] After payment of the specific debt for the security of which a pledge is made, and a demand and refusal to surrender the pledge, the pledgee's retention of it as security for another debt is a conversion.[5]

§ 567. **Even if the pledgee has been sued by a third person claiming title to the property pledged,** or the pledged property has been attached as the property of the pledgor after he has assigned it, his refusal to return it to the pledgor, or to his as-

[1] Reynolds v. Witte, 13 S. C. 5, 36 Am. Rep. 678.

[2] McCalla v. Clark, 55 Ga. 53; Ratcliff v. Vance, 2 Mill's Const. (S. C.) 239; Loughborough v. McNevin, 74 Cal. 250, 14 Pac. Rep. 369, 15 Pac. Rep. 773; Dodge v. Meyer, 61 Cal. 405, 420; Niles v. Edwards, 90 Cal. 10, 27 Pac. Rep. 159; Fitzgerald v. Blocher, 32 Ark. 742, 29 Am. Rep. 3.

[3] Butts v. Burnett, 6 Abb. Pr. N. S. (N. Y.) 302.

[4] McCalla v. Clark, 55 Ga. 53. But see Ponce v. McElvy, 47 Cal. 154; Flowers v. Sproule, 2 A. K. Marsh. (Ky.) 54.

[5] Luckey v. Gannon, 1 Sweeny (N. Y.) 12, 37 How. Pr. 134, 6 Abb. Pr. N. S. 209; Hardy v. Jaudon, 1 Robt. (N. Y.) 261.

signee, upon a tender of the debt, amounts to a conversion.[1] In a case where the pledgor, in a suit against him for the debt, set up a counter claim for the conversion of the pledged property by the pledgee, it appeared that the pledgor offered payment and made demand for the property, after the pledgee had been sued by a third person for a portion of the property, and the pledgee, upon the tender, offered to return the property not claimed by the third person, but refused to return the property so claimed. It was held by the supreme court of New York that, under these circumstances, such refusal did not amount to a conversion. The court, upon this point, said: "In the action brought by the third party against the present plaintiff the title was in dispute, and as the defendant in this action was made a party defendant to that, the question of the title was, of course, at issue in that action. Under such a state of facts, there was, we think, no conversion by the plaintiff. He offered, as it appears, on payment of the note, interest and costs, all the property pledged, except that portion for which the action was pending, and this, we think, under the circumstances, was all he was bound to do. To deliver the whole property to the present defendant would have been a conversion as against the other claimant, if she could establish that she had title to the portion she had sued for. But as the present defendant, as well as the plaintiff, was impleaded in the action in which the question of title was to be tried, we think the court below was correct in holding that, under such circumstances, no such conversion was shown as entitled the defendant to counter claim the value of the property pledged. He should have received the portion of the property pledged, which was offered to be returned, and paid the amount of the note, interest, and costs, which would have disposed of the present action. But, standing in his position as guarantor of the title to the plaintiff as pledgee, and knowing of the pendency of the action in which he was bound to defend that title, he could not, we think, by a simple demand, put the present

[1] Loughborough v. McNevin, 74 Cal. 250, 14 Pac. Rep. 369, 15 Pac. Rep. 773.

plaintiff in the position of a wrong-doer, in converting the property for which the other action was pending.'"[1]

This decision was, however, reversed by the court of appeals, Miller, J., delivering the judgment of this court, saying: "It only remains to be considered whether the conceded facts in the pleadings and the proof upon the trial show a conversion of the property. Unless the refusal to return the property was justified, there was clearly a conversion of the same by the plaintiff, and the defendant had a right of action for the recovery of the value thereof or of the property itself, or to interpose the defense set up by him as a counter claim to the plaintiff's demand. We are unable to discover any ground upon which the plaintiff could establish a right to retain the property after a demand, if the defendant was entitled to the same as the owner thereof. The fact that a portion of the property was claimed by another person, and that a suit had been brought for a recovery thereof, and that the defendant had been made a party defendant in said action, furnishes no justification for the refusal. If the defendant was the owner of the property he had a right to it, and the plaintiff was not justified in refusing to comply with his demand, for the reason that it was claimed by, and a suit had been brought for the recovery thereof by a third person. If he unlawfully refused to surrender the goods to the true owner, when demanded, he must abide the consequences of his own act. So long as the plaintiff retained possession without right he was liable to the owner for the same or the value thereof. A delivery to the true owner would have been an entire protection to the plaintiff and a complete defense to the action brought against him.

"The plaintiff, as bailee, had no right to deny the title of the defendant as bailor, if he, the bailor, was the true owner of the property. If there were conflicting claims to the same, the plaintiff had a complete remedy by bringing an action in the nature of a bill of interpleader, making the claimants parties

[1] Cass v. Higenbotam, 27 Hun (N. Y.) 406, 408, 15 N. Y. Weekly Dig. 135.

thereto, and in that form of an action it could be determined who was the true owner of the property.[1]"

§ 568. **The pledgee may show in defense to an action for the conversion of the pledge that it was the property of a third person,** to whom he has returned it.[2] Though the pledgee impliedly undertakes to return the pledge to the pledgor, the latter, in the first place, impliedly warranted the property to be his own; and if this warranty turns out to be false, the pledgee is absolved from his undertaking to restore the property to the pledgor, but should restore it to the true owner. "My impression is," said Chief Baron Pollock,[3] "that if a person pledges with another property to which he has no title, and which he has no right to pledge, the real owner may interpose and get possession of the property. In the administration of the criminal law it constantly occurs that where stolen property has been pledged the pawnbroker is called upon to deliver it to the rightful owner. If a servant illegally pledges his master's plate, the servant can not recover it by an action, since the pawnbroker may inquire who is really the true owner, and deliver it to him." And Baron Parke, in the same case, said: "In the ordinary case of a pledge, the pledgee impliedly undertakes to deliver back the property to the pledgor, when the sum for which it is pledged is paid. On the other hand, the pledgor impliedly undertakes that the property pledged is his own property, and may be safely returned to him."

The true ground on which a pledgee or other bailee may set

[1] Cass v. Higenbotam, 100 N. Y. 248, 254, 3 N. E. Rep. 189.

[2] Ogle v. Atkinson, 5 Taunt. 759; Wilson v. Anderton, 1 B. & Ad. 450; Dixon v. Yates, 5 B. & Ad. 313; Watson v. Lane, 11 Exch. 769; Sheridan v. New Quay Co., 4 C. B. N. S. 618; Biddle v. Bond, 6 Best & S. 225; Thorne v. Tilbury, 3 H. & N. 534; The Idaho, 93 U. S. 575, 579; Bates v. Stanton, 1 Duer (N. Y.) 79; Hayden v. Davis, 9 Cal. 573; Palmtag v. Doutrick, 59 Cal. 154, 8 Pac. Coast L. J. 884, 43 Am. Rep. 245; Dodge v. Meyer, 61 Cal. 405, 10 Pac. Coast L. J. 169, 182; Pitt v. Albritton, 12 Ired. (N. C.) 74.

[3] Cheesman v. Exall, 6 Exch. 341. The contract in this case, however, was held not to be a pledge, but the *dicta* of the learned judges deservedly have great weight.

up the right of a third person to the thing bailed is that indicated in a case decided in the fourteenth year of the reign of Elizabeth,[1] namely, that the estoppel which arises against the bailee, through his contract with the bailor, ceases when the bailment on which it is founded is determined by what is equivalent to eviction by title paramount.[2]

A second pledgee may discharge himself from liability to the owner of the thing pledged by showing that he returned it to his own pledgor before the owner offered to redeem.[3]

§ 569. **A pledgee in setting up the right of a third person to the thing pledged, of course takes upon himself the burden of proof** that such third person is the rightful owner.[4] Ordinarily he will have the aid of such third person in establishing the title of the latter; for the pledgee can only set up such title by the authority of such third person.[5]

§ 570. **A tender is generally necessary to a recovery of the securities.** Except in case there has been a wrongful conversion of collateral securities, the owner can not recover them without first paying or tendering the amount due on the pledge.[6] Such a tender is equally necessary whether the securities be in the hands of the original pledgee, or have been repledged or sold by him to one who has loaned upon them or purchased them in good faith without notice of the owner's rights. If the owner can enforce any right whatever to them he can

[1] Shelbury v. Scotsford, Yelv. 23.

[2] Biddle v. Bond, 6 Best & S. 225, per Parke, B. This is the view approved in Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245, per Thornton, J.

[3] Jarvis v. Rogers, 15 Mass. 389.

[4] Cheesman v. Exall, 6 Exch. 341; Sheridan v. New Quay Co., 4 C. B. N. S. 618; Biddle v. Bond, 6 Best & S. 225.

[5] Palmtag v. Doutrick, 59 Cal. 154, 168, 43 Am. Rep. 245, per Thornton, J.

[6] Donald v. Suckling, L. R. 1 Q. B 585; Talty v. Freedman's Savings & Trust Co., 93 U. S. 321; Amos v. Sinnott, 4 Scam. (Ill.) 440; Henry v. Eddy, 34 Ill. 508; Cooper v. Ray, 47 Ill. 53; Jarvis v. Rogers, 15 Mass. 389, 13 Mass. 105; Hancock v. Franklin Ins. Co., 114 Mass. 155; Hathaway v. Fall River Nat. Bank, 131 Mass. 14; Cumnock v. Newburyport Sav. Inst., 142 Mass. 342, 346, 7 N. E. Rep. 869; Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 601, 42 N. E. Rep. 995.

only do so after tendering the debt secured. One so taking the securities from the pledgee acquires at least the latter's lien and interest, whatever that may be. A mere offer by the original pledgor to pay the assignee the amount due on the securities, unattended with an actual tender of the original debt secured, is insufficient to extinguish the lien and entitle such pledgor to a return of the securities. Such offer to pay is not equivalent to an actual tender.[1]

A tender is not excused by the fact that the pledgor's note is in the hands of his pledgee. If the note has matured, the pledgor can safely pay the amount of it to the purchaser or second pledgee taking the security in good faith, because he could successfully defend a suit upon the note, whether brought by the original pledgee, or by his indorsee taking it after maturity. The pledgor may, also, after making tender, instead of suing at law for the recovery of the securities, file a bill in equity, making his pledgee and the second pledgee or purchaser defendants, and thus settle the rights of all parties in that litigation.[2]

§ 571. **An unauthorized sale of the pledge by the pledgee is not of itself a conversion,** and does not, against the will of the pledgor, create a cause of action in his favor. His cause of action does not arise until he tenders payment and demands a return of the pledge, and the pledgee neglects or refuses to return it.[3] Such a sale is not so far tortious as to render the contract void *ab initio*.[4] "Outside of authority, the rule that a sale by the pledgee is not *ipso facto* a conversion, seems to be good sense. The rights of the parties are based upon the contract. The sale by the pledgee is wrongful. If that sale in

[1] Lewis v. Mott, 36 N. Y. 395, 401. The securities were canal scrip of the state of Illinois; overruling Lewis v. Graham, 4 Abb. Pr. (N. Y.) 106.

[2] Talty v. Freedman's Savings & Trust Co., 93 U. S. 321.

[3] Halliday v. Holgate, L. R. 3 Exch. 299; Hopper v. Smith, 63 How. Pr. (N. Y.) 34, 38; Butts v. Burnett, 6 Abb. Pr. N. S. (N. Y.) 302, 304; Jarvis v. Rogers, 15 Mass. 389, 408; Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 600, 42 N. E. Rep. 995.

[4] First Nat. Bank v. Boyce, 78 Ky. 42, 19 Am. L. Reg. (N. S.) 503, 39 Am. Rep. 198.

and of itself determines the contract without more, then the pledgee by his wrongful act may rescind his contract in spite of the wish of the other party to it. I am not aware of any other case in which this can be done, and I can conceive of no reason for permitting it in this case. It may be for the interest of the pledgor to keep his contract alive, and, if it is so, I can not see why he may not do it. The maxim that no one shall take any advantage by his own wrongful act, may fairly apply to this case, and we may hold that, although the unlawful sale does not *per se* operate as a conversion, yet the pledgor may, at his option, so consider it, and that he may regard the contract as at an end, tender or offer to pay his debt and demand his pledge, or may sue for damages for the sale. I think the cases sustain that rule, and that it reconciles the cases which otherwise appear to conflict, but do not in fact.[1] I do not think that the plaintiff was called upon to notify defendant of his disaffirmance of the sale at the time defendant told him of it. There is no pretense of any estoppel. Nothing has occurred to give defendant reason to believe that the contract was waived, and he took no action afterwards on the strength of plaintiff's silence. As long as the contract was in force both parties were bound by it. The plaintiff might rely upon it, and the defendant must keep ready to perform it. Neither party by his own act simply could free himself from its obligations.'"[2]

A pledgee of mortgage notes sold them without authority at public auction to himself for a sum sufficient to pay the pledgor's note and to leave a balance in addition. He returned the note and the surplus money to the pledgor, who refused to recognize the sale, but retained the note and the surplus money. The pledgor, without tendering the amount due on his original note, sued the pledgee as for a conversion of the collateral mortgage notes which the pledgee still held.

[1] Strong v. Nat. Mechanics' Banking Asso., 45 N. Y. 718; Bryan v. Baldwin, 52 N. Y. 232.

[2] Hopper v. Smith, 63 How. Pr. (N. Y.) 34, 38, per Rumsey, J.

It was held that the sale of the collateral notes was a nullity, but that the pledgor not having paid or tendered his debt, he could not maintain the suit. The court said: "While there may be some conflict on the subject, we think the great weight of authority is that such sale being invalid, and the pledgee being the purchaser at the sale, and retaining the possession of such property, and having the power to return it to the pledgor, that this does not amount to a conversion by the pledgee, but that the parties occupy towards each other precisely the same relation as before the invalid sale, unless the pledgee elects to treat it as a valid sale, which he has a right to do, in which event the settlement would be made upon the basis of such sale, so ratified. But if the sale is not so ratified, then the pledgee continues to hold the collateral as security for his debt, and is entitled to do so until the debt is paid or payment thereof is tendered, so as to entitle the pledgor to its return."[1]

§ 571a. **If a pledgee by an unauthorized sale puts it out of his power to restore the property upon payment or tender of the debt secured, he is liable for its conversion without a demand** and tender of performance by the pledgor. "The observation sometimes met with in the opinions of judges, and in text-books, that the pledgor is at liberty to treat an unauthorized sale of the pledged property as a conversion by the pledgee, must be taken to refer to such a sale as puts the property beyond the control of the pledgee. In cases of that kind the pledgor may charge the pledgee as for a conversion of the property without demand or tender of performance, though he is not bound to do so, but may, by subsequent tender and demand, require the pledgee to account for the market value of the property at that time. And, of course, it is not the right of the pledgee to insist that his wrongful sale constitutes a conversion, for that would enable him, if he were allowed to do so, to take advantage of his own wrong, and by his own vio-

[1] Leighton v. Burkham, 7 Ohio C. C. 487, 488, per Smith, J.

lation of the contract determine the time, and thus the measure of his liability for its breach. As has already been stated, no offer was made by the pledgor, at any time, to pay the debt he owed the bank, nor was any demand made for the return of the iron held in pledge; and after it was bid off by the president of the bank on the 5th day of November, 1883, it remained in the control of the bank, as it had been before, without change in any respect, up to the 7th day of February, 1887, when, under the sale that day made, part of the iron passed into other hands; so that, until that time, the bank's possession was lawful and it was able to perform its obligation to the pledgor by returning the iron to him, upon payment of his debt. It had, up to that time, exercised no actual dominion or control over the property inconsistent with the pledgor's right to redeem; and the sale of November 5, 1883, being ineffectual to transfer the title, did not, we think, constitute a conversion of the property, which, in legal contemplation, was still held under the contract of pledge.'"[1]

§ 571b. **A nominal transfer of a pledge which does not put the property beyond the control of the pledgee does not amount to a conversion of the pledge.**[2] Such is the case when a pledgee transfers stock which he holds as collateral into the hands of another for the purpose of avoiding liability as

[1] Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 602, 42 N. E. Rep. 995, per Williams, J.; First Nat. Bank v. Rush, 85 Fed. Rep. 539, 71 Fed. Rep. 102; Waring v. Gaskill, 95 Ga. 731, 22 S. E. Rep. 659; Van Arsdale v. Joiner, 44 Ga. 173. See, also, Rosenzweig v. Frazer, 82 Ind. 342; Douglas v. Carpenter, 17 App. Div. (N. Y.) 329, 45 N.Y. Supp. 219; Kilpatrick v. Dean, 19 N. Y. St. Rep. 837, 3 N. Y. Supp. 60; Stearns v. Marsh, 4 Denio (N. Y.) 227; Luckey v. Gannon, 37 How. Pr. (N.Y.) 134; Read v. Lambert, 10 Abb. Pr. N. S. (N. Y.) 428; Moore v. Prentiss Tool & Supply Co., 133 N. Y. 144, 30 N. E. Rep. 736; Felt v. Heye, 23 How. Pr. (N. Y.) 359; Sheridan v. Presas, 18 Misc. (N. Y.) 180, 186, 41 N.Y. Supp. 451; Ainsworth v. Bowen, 9 Wis. 349; Work v. Bennett, 70 Pa. St. 484; Sanborn v. Colman, 6 N. H. 14, 23 Am. Dec. 703; Walley v. Deseret Nat. Bank, 14 Utah 305, 47 Pac. Rep. 147; Lucketts v. Townsend, 3 Tex. 119, 49 Am. Dec. 723; Johnston v. Whittemore, 27 Mich. 463, 469; Grant v. King, 14 Vt. 367; Swift v. Moseley, 10 Vt. 208, 33 Am. Dec. 197.

[2] Jeanes's Appeal, 116 Pa. St. 573, 11 Atl. Rep. 862; Donnell v. Wyckoff, 49 N. J. L. 48, 7 Atl. Rep. 672.

a stockholder, taking certificates in the name of the transferee with a power of attorney to transfer them at his will.[1] Such is the case also where a pledgee transfers mining stock to another for the purpose of relieving himself from supposed damage to his credit by reason of holding so much of that stock, the stock remaining within his control ready for delivery to the pledgor on payment of his indebtedness.[2]

The fact that a pledgee attempts to assert a larger right in the property than he can maintain does not of itself constitute a conversion of it, it being clear that he is entitled to possession as a pledgee.[3]

§ 572. **No formal demand or tender by the pledgor after an unauthorized sale by the pledgee is necessary, if he has substantially offered to redeem,** by paying whatever is due. Thus, a watch having been pledged for the payment of a loan made without a specified time for repayment, the creditor subsequently notified his debtor that he must redeem the watch or it would be sold. The latter thereupon deputed an agent to effect a redemption. The agent called upon the defendant a number of times, with money sufficient for the purpose, and offered to pay even more than the amount which the creditor claimed to be owing him, but, upon one and another pretense, the agent was put off for several months, when the creditor declared that he had disposed of the watch in exchange for another and a sum of money. It was held that the debtor could maintain a suit for the conversion of the watch without any formal demand, and without a formal tender of the money due.[4]

The pledgor may maintain a suit for the conversion of the pledge which the pledgee has sold without giving notice or demanding payment of the debt without making tender of the amount of it, where the pledge is of greater value than the debt. Thus where the pledgee executes an absolute trans-

[1] Heath v. Griswold, 18 Blatchf. 555, 5 Fed. Rep. 573.

[2] Day v. Holmes, 108 Mass. 563.

[3] Radigan v. Johnson, 174 Mass. 68, 54 N. E. Rep. 358.

[4] Rosenzweig v. Frazer, 82 Ind. 342.

fer of a bond and mortgage without giving the pledgor notice or demanding repayment of the loan, and the mortgage is subsequently foreclosed and the property sold, the pledgor is entitled, without tendering to the pledgee the amount of the debt, to maintain an action against the latter to recover the difference, if any, between the face value of the bond and mortgage and the amount of the debt for which they were pledged.[1]

§ 573. **A tortious conversion by the pledgee through an illegal sale of the pledge may be waived,** by the debtor's presenting a statement showing the amount he claimed to be due and offering to receive the same in full satisfaction.[2]

Where, upon maturity and non-payment of the loan, the pledgee, with assent of the pledgor, transfers the stock pledged to a third person, for a less sum than it was pledged to secure, and there is no proof that the stock pledged was worth more than that sum, the pledgee is not liable for a conversion of the stock, the debt still remaining unpaid.[3]

§ 573a. **An unauthorized sale of the pledged property by the pledgee does not cause him to lose the lien of his pledge** and render him liable for the value of the property, if no damage is sustained by the pledgor. In an action by pledgors against pledgees for an unauthorized sale of the pledge the supreme court of Massachusetts, deciding to this effect, say: "The plaintiffs admit in substance that the defendants used good judgment and diligence in selling, and that the sales were effected at favorable prices, and it does not appear that the proceeds were more than enough to pay what was due the defendants. Under such circumstances we fail to see how the plaintiffs have sustained any damage. It would be singular if, having a right to foreclose the pledge, the defendants

[1] Barber v. Hathaway, 47 App. Div. (N. Y.) 165, 62 N. Y. Supp. 329.

[2] Butts v. Burnett, 6 Abb. Pr. N. S. (N. Y) 302.

[3] McClintock v. Central Bank, 120 Mo. 127, 24 S. W. Rep. 1052.

should be held to have lost their lien and to be liable for the value of the bicycles, because, without inflicting any damage thereby on the pledgor, they went the wrong way about the foreclosure or claimed a greater right than they actually had. We do not think that such is the law."[1]

§ 574. **Measure of damages.**—The value of the property at the date of the conversion is the true criterion of damages.[2]

If at the maturity of the debt for which the pledge was made the debtor tenders payment of it, and demands the return of the security, and this is not returned, the conversion is made at that time, and the valuation of it in a suit for such conversion should be made as of the time of such demand and refusal.[3]

§ 575. **A conversion of negotiable paper by one who holds it as collateral security** renders him liable to the general owner for its value at the time; and this value is, *prima facie*, the sum represented upon the face of the paper, with interest according to its terms,[4] but it may be shown, in reduction of damages, that the maker of the note is insolvent; and so may

[1] Whipple v. Dutton, 175 Mass. 365, citing Dahill v. Booker, 140 Mass. 308, 5 N. E. Rep. 496; Farrar v. Paine, 173 Mass. 58, 53 N. E. Rep. 146, and cases cited; Halliday v. Holgate, L. R. 3 Ex. 299; Johnson v. Stear, 15 C. B. N. S. 330; Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 269; Wheeler v. Pereles, 43 Wis. 332; Belden v. Perkins, 78 Ill. 449; Gruman v. Smith, 81 N. Y. 25; Smith v. Reeves, 33 How. Pr. (N. Y.) 183; VanSchaick v. Ramsey, 90 Hun 550, 552, 35 N. Y. Supp. 1006.

[2] First Nat. Bank v. Boyce, 78 Ky. 42; August v. O'Brien, 50 App. Div. (N. Y.) 626, 63 N. Y. Supp. 989; Newcomb v. Baskett, 14 Bush (Ky.) 658, 667; Harrell v. Citizens' Banking Co., 111 Ga. 846, 36 S. E. Rep. 460; Fisher v. Geo. S. Jones Co., 108 Ga. 490, 34 S. E. Rep. 172; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497; Ainsworth v. Bowen, 9 Wis. 348; Loomis v. Stave, 72 Ill. 623; Eisendrath v. Knauer, 64 Ill. 396; Iler v. Baker, 82 Mich. 226, 46 N. W. Rep. 377; Fifth Nat. Bank v. Providence Warehouse Co., 17 R. I. 112, 118, 20 Atl. Rep. 203; Jamison's Estate, 163 Pa. St. 143, 29 Atl. Rep. 1001.

[3] Reynolds v. Witte, 13 S. C. 5, 36 Am. Rep. 678.

[4] Hazzard v. Duke, 64 Ind. 220; St. John v. O'Connel, 7 Port. (Ala.) 466; Potter v. Merchants' Bank, 28 N. Y. 641; Booth v. Powers, 56 N. Y. 22; Thayer v. Manley, 73 N. Y. 305; Griggs v. Day, 136 N. Y. 152, 32 N. E. Rep. 612.

any other fact impugning the value of the security be shown.[1] If the property be negotiable bonds, the measure of damages is the value of the bonds, and of the mature coupons at the time of the conversion, with interest from that time.[2]

If a creditor holding a mortgage note as collateral security pledge it as his own, he is liable to the owner for the full amount of the note, unless he clearly proves that the note was worth less than its face. The burden is upon him to prove that the note is not worth what it calls for.[3]

If a pledgee of a note does not return it to his debtor after the payment of the debt, and he shows no legal reason for not doing it, he is liable in damages to the full amount of the note. It might be a defense in such case that the maker of the note is not able to pay it, or that it is barred by the statute of limitations; but it is no ground for reducing the damages, that the pledgee has filed in court an obligation to indemnify the pledgor against any act done or to be done by the pledgee in respect to the note, unless he is able to prove the loss of the note.[4]

§ 576. **It may be shown in mitigation of damages** in an action by the pledgor for the conversion of a pledge, that the pledgee has applied the proceeds thereof to the use of the pledgor in payment of the debt secured or of other debts due from him to the pledgee.[5] This is upon the principle that the owner of property, who has received the value of the property wrongfully converted or kept from him, shall not recover that value a second time in an action therefor.

[1] Griggs v. Day, 136 N. Y. 152, 32 N. E. Rep. 612, 48 N. Y. St. Rep. 853, reversing 46 N. Y. St. Rep. 967, 18 N. Y. Supp. 957; Garlick v. James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294; Vose v. Florida R. Co., 50 N. Y. 369.

[2] Merchants' & Planters' Nat. Bank v. Masonic Hall, 62 Ga. 271.

[3] Laloire v. Wiltz, 29 La. Ann. 329.

[4] Thomas v. Waterman, 7 Metc. (Mass.) 227.

[5] Hathaway v. Fall River Nat. Bank, 131 Mass. 14, 17, per Soule, J.; Bailey v. Godfrey, 54 Ill. 507, 5 Am. Rep. 157; Baldwin v. Bradley, 69 Ill. 32; Belden v. Perkins, 78 Ill. 449; Loomis v. Stave, 72 Ill. 623.

§ 577. **In an action against the pledgee for a conversion of the pledge, he may recoup or offset the debt secured,**[1] though this right does not exist in favor of one who is sued for the conversion of a chattel on which he has merely a lien.[2]

A conversion of negotiable bonds by a pledgee does not prevent his recovery of what is due him, but only entitles the pledgor to offset the value of the converted security.[3] And so a conversion by a broker of stock pledged to him does not operate to extinguish his entire claim against his customer, but simply to give the customer a cause of action for the damages he has sustained, which would be offset against any sum found due to the brokers.[4]

Whether in a suit by the pledgee upon the debt secured, the pledgor can take advantage of an irregular or prejudicial sale of the security by recoupment, is a question left undecided by early cases in New York.[5]

§ 578. **Counter claim.**—An action by a pledgor for the pledgee's wrongful refusal to deliver the property pledged after payment of the debt is an action for the conversion of the pledgor's property, and is founded upon his own title, and not upon any promise of the pledgee. A counter claim to such suit for a debt not secured by the pledge can not be set up by the pledgee.[6] But the pledgee is allowed to recoup the amount of the debt secured; or, in other words, the pledgor is allowed to recover the value of the pledge at the time of the conversion, less the amount of the debt.[7]

[1] Johnson v. Stear, 15 C. B. (N. S.) 330; Jarvis v. Rogers, 15 Mass. 389; Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248; Ward v. Fellers, 3 Mich. 281, 288; Belden v. Perkins, 78 Ill. 449; Rosenzweig v. Frazer, 82 Ind. 342; Shaw v. Ferguson, 78 Ind. 547; Jamison's Est., 163 Pa. St. 143, 29 Atl. Rep. 1001; Fletcher v. Harmon, 78 Me. 465, 7 Atl. Rep. 271; Feige v. Burt, 118 Mich. 243, 77 N.W. Rep. 928.

[2] Mulliner v. Florence, 3 Q. B. D. 484.

[3] Levy v. Loeb, 47 N. Y. Superior Ct. 61.

[4] Gruman v. Smith, 81 N. Y. 25, 9 Rep. 748, reversing 44 Superior Ct. 389.

[5] Willoughby v. Comstock, 3 Hill 389; Taggard v. Curtenius, 15 Wend. 155.

[6] Smith v. Hall, 67 N. Y. 48.

[7] Jarvis v. Rogers, 15 Mass. 389;

§ 579. **In case of a re-hypothecation,** the original contract of pledge not being destroyed, the pledgor can recover from the second pledgee the chattel pledged only by paying to him the amount of debt due to the first pledgee.[1] In trover, by the owner against a second pledgee, he may recover the value of the property, after allowing the amount due from the owner to his pledgee in reduction of the damages.[2] It is essential, however, that the second pledgee should have acted in good faith in taking the property in pledge, and should have taken it for value without knowledge of the prior pledge. If the original pledgee, had all the *indicia* of the right of property in the thing pledged, and his pledgee was without knowledge of the plaintiff's rights, and gave a valuable consideration, the measure of damages is always the actual loss the plaintiff has sustained; and this is the value of the property, less the sum due the plaintiff from the original pledgee.[3]

§ 580. **If the pledgee has sold the pledged chattels and converted them into money the pledgor may, if he choose, bring assumpsit for the money,** in which event he can recover only

cited and approved in Johnson v. Stear, 15 C. B. (N. S.) 330; Smith v. Hall, 67 N. Y. 48; Baker v. Drake, 53 N. Y. 211, 66 N. Y. 518, 13 Am. Rep. 507, 23 Am. Rep. 80; Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248; Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 242, 269, 307.

[1] Donald v. Suckling, L. R. 1 Q. B. 585, 597; Johnson v. Stear, 15 C. B. (N. S) 330; Halliday v. Holgate, L. R. 3 Ex. 299; Evans v. Potter, 2 Gall. 13; Talty v. Freedman's Savings & Trust Co., 93 U. S. 321; Lewis v. Mott, 36 N. Y. 395, 400.

In Donald v. Suckling, L. R. 1 Q. B. 585, 597, Cockburn, C. J., says: "The question here is, whether the transfer of the pledge is not only a breach of the contract on the part of the pawnee, but operates to put an end to the contract altogether, so as to entitle the pawnor to have back the thing pledged without payment of the debt. I am of opinion that the transfer of the pledge does not put an end to the contract, upon which the owner may bring an action for nominal damages, if he has sustained no substantial damages; for substantial damages if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged."

[2] First Nat. Bank v. Boyce, 78 Ky. 42; Neiler v. Kelley, 69 Pa. St. 403; Work v. Bennett, 70 Pa. St. 484; Baltimore Mar. Ins. Co. v. Dalrymple, 25 Md. 242.

[3] First Nat. Bank of Louisville v. Boyce, 78 Ky. 42, 28 Am. Law Reg. 503.

the amount actually received by the pledgee for the property, less the amount of the debt secured by the pledge.[1]

V. *Staleness of Claim and Statute of Limitations.*

§ 581. **A pledgee has no right to treat the property pledged as absolutely his own after the note or other obligation given by the pledgor is barred** by the statute of limitations. After the maturity of such obligation, the pledgee may, upon giving notice to the pledgor, sell the property and apply the proceeds to the debt. If he does not do this he continues to hold it in trust for the benefit of all parties. The statute affects merely the personal remedy against the pledgor, and does not, on the one hand, defeat the lien of the pledgee upon the property, nor, on the other, enlarge that lien to an absolute title to the property.[2] It is true, however, that after a long lapse of time without any claim on the part of the pledgor to redeem, his right might be deemed to be extinguished and the title absolute in the pledgee.[3] Thus, where certain shares of bank stock were assigned as collateral security for the payment of a time note, and six years after the maturity of the note the stock was not of sufficient value to pay the debt, and the creditor had then and always treated the shares as his own, a court of equity after the lapse of eleven years, when the shares had risen in value, refused to grant relief.[4]

[1] Cushman v. Hayes, 46 Ill. 145; Read v. Lambert, 10 Abb. Pr. N. S. (N. Y.) 428; Fletcher v. Harmon, 78 Me. 465, 7 Atl. Rep. 271.

[2] Kemp v. Westbrook, 1 Ves. 278; Hancock v. Franklin Ins. Co., 114 Mass. 155; Hartrauft's Estate, 153 Pa. St. 530, 26 Atl. Rep. 104; Whelan v. Kinsley, 26 Ohio St. 131; Moses v. St. Paul, 67 Ala. 168, 172, per Brickell, C. J.; Cross v. Eureka L. & Y. Canal Co., 73 Cal. 302, 14 Pac. Rep. 885; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Dewey v. Bowman, 8 Cal. 151; Chouteau v. Allen, 70 Mo. 290, 341; Roots v. Mason City S. & M. Co., 27 W. Va. 483; Camden v. Alkire, 24 W. Va. 674.

This principle has no application to the provision of the United States bankrupt law prohibiting suits by or against assignees after two years from the accruing of the right of action. Moses v. St. Paul, 67 Ala. 168.

[3] Story on Bailments, § 298; Mims v. Mims, 3 J. J. Marsh. (Ky.) 103, 106; Hancock v. Franklin Ins. Co., 114 Mass. 155.

[4] Waterman v. Brown, 31 Pa. St. 161.

Where a pledge of stock in a land company was made in 1871 and the pledgee carried the stock till 1881, when it approximated par value, and he sold it for less than the amount advanced upon it, its value during this period fluctuating much, but never exceeding the amount advanced, upon a bill in equity by the pledgor for an account and redemption filed in 1884, and seeking to hold the pledgee accountable for the value of the stock at a time subsequent to the sale when it had greatly appreciated in value, it was held that the bill should be dismissed, on account of the staleness of the demand. Mr. Justice Somerville, delivering the judgment of the supreme court of Alabama, said: "It is well settled that a much shorter time will be allowed the pledgor within which to exercise the right of redemption where he seeks to make a profit out of the unexpected rise in the value of pledged stocks, than where he seeks merely to compel the pledgee to account for a surplus received by him from the sale of stocks in ordinary cases." The learned judge, after alluding to the fact that a pledge of corporate stock partakes of the nature of both a pledge and a mortgage, because the transferee holds both the possession and the title of the thing transferred, further said: "In this aspect of the law, to which I am not averse, there can be no room for disputation as to the fact that the case made by the bill was barred in six years from the day of forfeiture, there being no proof of any recognition of the claimant's title within this period, and therefore a presumed adverse holding by the defendant.'"[1]

In another case the pledgor was not allowed to redeem after the lapse of ten years from the time the debt secured became due.[2] The property pledged in this case consisted of shares in a corporation which was paying dividends, and the debtor contended that the statute of limitations would not commence running until the debt should be paid out of the dividends; but in the absence of any allegation or proof of an agreement that the

[1] Gilmer v. Morris, 80 Ala. 78, 85, per Somerville, J.

[2] Roberts v. Sykes, 30 Barb. (N. Y.) 173.

pledgee should keep the stock until he should be repaid out of the dividends, the court held that the pledgor was not entitled to be relieved from the statute of limitations.[1]

In Louisiana it is provided by the code that the creditor can not acquire the pledge by prescription, whatever may be the time of his possession.[2]

§ 582. **On the other hand a debtor can not by reason of his debt becoming barred by the statute recover back the security pledged.** Nothing short of payment or tender of the debt will discharge the lien and entitle the debtor to its return. The statute of limitations does not extinguish the debt but only the remedy to enforce it.[3]

§ 583. **The statute commences to run after a tender by the pledgor and refusal by the pledgee** to restore the thing pledged;[4] or after any act on his part which would show his determination to dissolve his trust relation to the pledgor.[5]

§ 583a. **Collections made by a creditor on notes or other securities pledged by the debtor are regarded as payments** made by the debtor as of the date when they are received, such as will take the balance of the debt out of the statute of limitations.[6] The statute of limitations begins to run against an action for the balance of the debt from the time when the creditor made the last collection upon the collateral security.[7]

[1] Roberts v. Sykes, 30 Barb. (N. Y.) 173.

[2] R. Civ. Code 1870, art. 3175.

[3] Jones v. Merchants' Bank of Albany, 6 Robt. (N. Y.) 162, 4 Robt. (N. Y.) 221; *In re* Oakley, 2 Edw. Ch. (N. Y.) 478; Hancock v. Franklin Ins. Co., 114 Mass. 155; Grant v. Burr, 54 Cal. 298; Spect v. Spect, 88 Cal. 437, 26 Pac. Rep. 203, 22 Am. St. Rep. 314; Zellerbach v. Allenberg, 99 Cal. 57, 69, 33 Pac. Rep. 786; Hudson v. Wilkinson, 61 Tex. 606.

[4] Whelan v. Kinsley, 26 Ohio St. 131, per McIlvaine, C. J.

[5] Jones v. Thurmond, 5 Tex. 318.

[6] Buffinton v. Chase, 152 Mass. 534, 25 N. E. Rep. 977.

[7] Hancock v. Franklin Ins. Co., 114 Mass. 155.

CHAPTER XV.

BANKRUPTCY AND INSOLVENCY.

§ 584. **Upon the bankruptcy of the pledgor,** the pledgee is still entitled to hold possession of the property pledged, except in case the pledge was made in fraud of the bankrupt law, and is consequently void, when of course the assignee in bankruptcy may disregard the contract of pledge, and recover the property for the benefit of the creditors. The only rights of the assignee as regards a valid pledge are either to redeem the property or under order of court to sell it subject to the lien of the pledge.[1] The pledgee may at his option rely wholly upon his security and refuse to prove his claim in the bankruptcy court; and in doing so he only loses the privilege of participating in the distribution of the bankrupt's estate. The pledgee may, notwithstanding the pledgor's bankruptcy, proceed upon default to sell the pledge in the usual way;[2] but it would seem that after the assignment, notice of the sale should be given to the assignee in bankruptcy.

Upon the failure of the maker of a note, for the payment of which the holder has collateral securities, the latter is not compelled to join other creditors in a settlement, and receive his *pro rata* dividend, but is entitled to look to his securities for the full satisfaction of the note.[3]

A clause in a deed to secure creditors which requires a release of the debtor from personal liability for the balance of the

[1] Yeatman v. Savings Inst., 95 U. S. 764; Jerome v. McCarter, 94 U. S. 734; Moses v. St. Paul, 67 Ala. 168; Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 208; Dowler v. Cushwa, 27 Md. 354.

[2] Jerome v. McCarter, 94 U. S. 734.

[3] Hanover Nat. Bank v. Brown, (Tenn. Ch. App.), 53 S. W. Rep. 206.

debts not paid out of the trust fund, does not affect the right of the creditor to hold collaterals previously assigned to secure the payment of his debt. Such release does not extinguish the debt, nor deprive the creditor of any security held for it. A policy on the life of the debtor assigned to and held by the creditor is not affected by such release.[1]

§ 585. **As a general rule an assignee for the benefit of creditors holds the property assigned subject to the same equities** as the debtor held it.[2]

But this general proposition is subject to exceptions. There are many transactions which are binding on the debtor while not binding on the assignee. Pledges made for the actual purpose of defrauding creditors are of this class, and so are pledges made contrary to statute or to the policy of the law. The general rule is restricted to cases in which the creditor claiming adversely to the assignee has a clear legal or equitable title to the property claimed, and does not apply to cases in which the creditor claims a security denied by the law.[3] An assignee or trustee for creditors may well oppose any security claimed by a creditor, when the law, unaided by a *bona fide* purchase or judgment, would regard the security as void against the general creditors in a direct contest between them and the creditor claiming such security or preference; even though the debtor himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim.[4] A receiver of a national bank, which can not be put into bankruptcy, but can only be wound up under the peculiar provisions of the banking act, has the same power in this respect that an assignee has; otherwise the absurd consequence would

[1] Long v. Meriden Britannia Co., 94 Va. 594, 27 S. E. Rep. 499.

[2] Mitford v. Mitford, 9 Ves. Jr. 87; Mitchell v. Winslow, 2 Story 630; Gibson v. Warden, 14 Wall. 244; Cook v. Tullis, 18 Wall. 332; Partee v. Corning, 9 La. Ann. 539; Casey v. La Société de Credit Mobilier, 2 Woods 77, 84, per Woods, J.; Dowler v. Cushwa, 27 Md. 354.

[3] Casey v. Cavaroc, 96 U. S. 467, 487; Bank of Alexandria v. Herbert, 8 Cranch 36.

[4] Casey v. Cavaroc, 96 U. S. 467, 487, per Bradley, J.

follow, that the property of a bank disposed of by voluntary conveyances, or pledges not good as to third persons, would be beyond the reach of creditors.[1]

An assignee for creditors stands in his assignor's shoes, and can not attack a pledge of the assignor's property because the change of possession was not sufficient. But creditors for whose benefit an assignment has been made may nevertheless prosecute their claims to judgment and levy execution.[2]

§ 586. **An assignee who collects securities pledged by the bankrupt will be directed to apply the proceeds for the benefit of the pledgee.** Thus, a debtor having pledged a promissory note already pledged and delivered as security by him, his assignee received it from the first pledgee, and collected it; but the second pledgee was allowed upon petition to follow the proceeds into the hands of the assignee. This right does not depend upon any regulation of the Bankrupt Act, but upon the general principle of equity that a party interested in property may follow his interest into any new form into which it may have been changed without his fault or consent.[3]

§ 587. **By the general law in equity the pledgee may prove his whole claim against the pledgor's estate in insolvency without deducting the value of his security.** This is the rule more generally adopted under the state insolvency laws, under general assignments in the settlement of insolvent estates of deceased persons, and in winding up insolvent corporations.[4] If the dividend so reduces the debt that the collateral security will more than pay it, the security must be redeemed for the benefit of the general creditors.[5] This rule gives effect to the

[1] Casey v. Cavaroc, 96 U. S. 467, 487. See Casey v. La Société de Credit Mobilier, 2 Woods 77, 84.

[2] George v. Pierce, 123 Cal. 172, 55 Pac. Rep. 775, affirmed 56 Pac. Rep. 53. See Goodbar v. Locke, 56 Ark. 314, 19 S. W. Rep. 924.

[3] *In re* Wiley, 4 Biss. 171.

[4] Lowell on Bankruptcy, § 403. In Cook Co. Nat. Bank v. United States, 107 U. S. 445, 2 S. C. Rep. 561, it was expressly declared that the priorities and method of distribution under the bankrupt law had no application to the winding up of insolvent national banks.

[5] Story's Eq. Jur., § 564; Lewis v. United States, 92 U. S. 618; Merrill v.

equitable principle that a creditor's diligence shall be rewarded by giving him his full legal rights.[1] Aside from the accidents of the insolvency or death of the debtor, a creditor holding a mortgage or a pledge has a double security. "He has a right to proceed against both, and to make the most he can of both; why he should be deprived of this right because the debtor dies insolvent, is not very easy to see."[2]

Nat. Bank, 173 U. S. 131, 19 S. C. Rep. 360 (case of an insolvent corporation); Chemical Nat. Bank v. Amstrong, 59 Fed. Rep. 372 (case of insolvent bank); Tod v. Kentucky Union Land Co., 57 Fed. Rep. 47; *Ex parte* Kelty, 1 Low. Dec. 394.

Connecticut: Findlay v. Hosmer, 2 Conn. 350.

Illinois: Paddock v. Bates, 19 Ill. App. 470; *In re* Bates, 118 Ill. 524, 9 N. E. Rep. 257. This was under an assignment for the benefit of creditors. See § 588; Furness v. Union Nat. Bank, 147 Ill. 570, 35 N. E. Rep. 624 (insolvent estate of deceased).

Indiana: Hight v. Taylor, 97 Ind. 392.

Kentucky: Logan v. Anderson, 18 B. Mon. 114; Citizens' Bank v. Patterson, 78 Ky. 291. This was a voluntary assignment. Others were in insolvency. See § 588.

Michigan: Third Nat. Bank v. Haug, 82 Mich. 607, 47 N. W. Rep. 33; Southern Mich. Nat. Bank v. Byles, 67 Mich. 296, 34 N. W. Rep. 702.

New Hampshire: Moses v. Ranlet, 2 N. H. 488.

New Jersey: Van Mater v. Ely, 12 N. J. Eq. 271; Vanderveer v. Conover, 16 N. J. L. 487; Moses v. Thomas, 26 N. J. L. 124; Bell v. Fleming, 12 N. J. Eq. 15, 30, 495; Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 40, 29 Atl. Rep. 203.

New York: Jervis v. Smith, 1 Sheldon 189, 7 Abb. Pr. N. S. 217; Midgeley v. Slocomb, 32 How. Pr. 423, 2 Abb. Pr. N. S. 275; People v. Remington, 121 N. Y. 328, 24 N. E. Rep. 793, 54 Hun 505, 8 N. Y. Supp. 34.

North Carolina: Brown v. Merchants' & Farmers' Nat. Bank, 79 N. C. 244.

Ohio: Lloyd v. Western Nat. Bank, 30 Weekly L. Bull. 165.

Oregon: Kellogg v. Miller, 22 Ore. 406, 30 Pac. Rep. 229.

Pennsylvania: Jamison's Est., 163 Pa. St. 143, 29 Atl. Rep. 1001; Miller's App., 31 Pa. St. 481; Skunk's Appeal, 2 Pa. St. 304; Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479; Morris v. Olwine, 22 Pa. St. 441; Brough's Estate, 71 Pa. St. 460; Graeff's Appeal, 79 Pa. St. 146, 148; Miller's Estate, 82 Pa. St. 113.

Rhode Island: Allen v. Danielson, 15 R. I. 480, 8 Atl. Rep. 705, overruling Knowles, Petr., 13 R. I. 90.

Vermont: Putnam v. Russell, 17 Vt. 54, 42 Am. Dec. 478; West v. Bank of Rutland, 19 Vt. 403; Walker v. Barker, 26 Vt. 710. These cases related to claims against the estates of deceased persons. The rule is otherwise in insolvency cases. See § 588.

Wisconsin: *In re* Meyer, 78 Wis. 615, 48 N. W. Rep. 55.

[1] Jervis v. Smith, 1 Sheldon (N. Y.) 189, 194, 7 Abb. Pr. N. S. 217, per Masten, J.

[2] Mason v. Bogg, 2 Mylne & C. 443, 448, per Lord Chancellor Cottenham.

Thus, a creditor holding a mortgage was allowed a dividend under his debtor's assignment for the benefit of his creditors upon his whole claim, although he had collected the greater part of the claim out of the mortgaged property, the amount collected and the dividend together not being sufficient to satisfy the debt; and was not restricted to a dividend on his claim as reduced by the proceeds of the mortgage. It is true that before the proceedings on the mortgage, the account of the assignees had been filed, and an auditor had reported a scheme of distribution, but the dividend apportioned to the claim was retained under control of the court until the proceedings on the mortgage were terminated. Then he was permitted to take the dividend on his whole claim as it was before any portion of it had been paid.[1]

But under an assignment for the benefit of creditors, a creditor holding notes of third persons as collateral security, upon collecting these notes before a dividend is made, under the assignment, must credit the amount upon the principal debt, and take a dividend under the assignment upon the remainder only of the debt; he can not collect the collaterals and then claim a dividend upon the principal debt as it was at the time of the assignment. The law applies the collections to the payment of the debt, so that the creditor ceases to be the holder of the collateral notes.[2]

§ 587a. **A creditor claiming to hold another obligation of his debtor as collateral security is entitled to a dividend only on the principal obligation.** Thus, a creditor of an insolvent corporation is not entitled to prove in insolvency or against the assets of the corporation in the hands of a receiver, negotiable bonds of the corporation for amounts in addition to the principal indebtedness, when these bonds represent no indebtedness, but were received and held merely as collateral security.[3] So,

[1] Morris v. Olwine, 22 Pa. St. 441. See, also, Miller's Appeal, 35 Pa. St. 481.

[2] Midgeley v. Slocomb, 32 How. Pr. (N. Y.) 423.

[3] International Trust Co. v. Union Cattle Co., 3 Wyo. 805, 31 Pac. Rep. 408.

also, where a creditor of a railroad company who holds its promissory note, and, as collateral security for the same, three other notes of the corporation, with coupons attached, of a kind regularly quoted in the market, is entitled to prove only the amount of the original note against that corporation. Mr. Justice Colt, delivering the opinion of the supreme court of Massachusetts, said: "A debtor's liability to his creditor, where other creditors are concerned, is not increased by increasing the number of his promises to pay the same debt, in whatever form he may make them. To hold otherwise would be to enable the debtor to incumber his assets by a new method, greatly to the prejudice of all other creditors."[1]

§ 587b. **Whether a creditor holding collateral securities is entitled to participate in dividends for the amount of his debt as it existed at the date of making his proof,** or for the amount of it at the date of the assignment in insolvency or for the benefit of creditors, or for the amount as it exists at the time the dividends are made, is a question upon which the rule differs in different states. Thus, in some states it is held that a creditor acquires no vested interest in the assigned estate of an insolvent until his assent to the assignment is signified by proving his claim, and that the amount of his claim on which he is to receive dividends is to be determined as of that date. Payments received on collateral securities before that date are to be deducted from the entire claim, but payments received after proof and before the time of distribution are not to be deducted, because otherwise a readjustment of the claim would be necessary at the time of declaring each dividend, and there would be no fixed sum due each creditor as a basis for the declaration of dividends.[2] In a recent case in Illinois the court say: "Our conclusion is, that the amount upon which the secured creditor is entitled to receive dividends from the assets

[1] Third National Bank v. Eastern R. Co., 122 Mass. 240, 242. See, also, People v. Remington, 54 Hun 480, 8 N. Y. Supp. 31, affirmed 121 N. Y. 675, 24 N. E. Rep. 1095.

[2] Levy v. Chicago Nat. Bank, 158 Ill. 88, 42 N. E. Rep. 129; Furness v. Union Nat. Bank, 147 Ill. 570, 35 N. E. Rep. 624.

of the insolvent estate, is the amount actually due to the creditor when he files his proof of claim, or presents his claim under oath; that the subsequent hearing upon objections or exceptions should be directed to the inquiry as to what was due at that date; that the amount due at that date is to be ascertained by the deduction from the principal debt of all payments made before that date, whether realized from collaterals, or otherwise, but that amounts realized from collaterals after that date are not to be deducted, subject always to the qualification that the dividends received from the general assets, and the amounts realized from the collateral security shall not together exceed the amount due the creditor upon his claim.'"[1]

The rule of chancery in England is the same. In a case before the court of chancery appeals Lord Justice Wood said: "There remains the question as to the time with reference to which the amount provable is to be ascertained; and as to this there is a little more difficulty. I think, however, that the true rule is, that the debt is to be taken as it stands at the time when the claim is put in. * * * Where the demand of the creditor was large, and the securities held by him considerable, the official liquidator might dispute the claim for the very purpose of obliging the creditor to realize some of his securities before the time for making his affidavit arrived. * * * It appears to me that it would be leaving a great deal too much to the caprice or arbitrary discretion of the liquidator, if we were to fix upon any time except the time when the claim which is to be adjudicated upon was sent in."[2]

§ 587c. **A rule adopted in other states requires a readjustment of the claim at the time of each successive dividend,** if collections have in the meantime been made upon the collaterals. This rule requires that all sums collected from col-

[1] Levy v. Chicago Nat. Bank, 158 Ill. 88, 102, 42 N. E. Rep. 129, per Magruder, J.

[2] Kellock's Case, L. R. 3 Ch. 769. See, also, *In re* Barned's Banking Co., Forwood's Claim, L. R. 5 Ch. 18; Eastman v. Bank of Montreal, 10 Ont. 79; Fottrell v. Kavanagh, 10 Ir. Rep. Eq. 256; *Ex parte* Wildman, 1 Atk. 109.

laterals before the proof of the claim shall be deducted, and proof made for the remainder of the claim then remaining unpaid; and afterwards, immediately before or at the time of each dividend, all sums derived from the collaterals between the date of proof and the date of such dividend must be deducted from the claim and the creditor will receive dividends according to the balance then due.[1]

§ 588. **But the rule in bankruptcy adopted by other courts** is, that a creditor holding a pledge is admitted to prove or to receive dividends only for the balance of his debt, after deducting the value of his security, or its proceeds when collected, in proceedings under bankrupt or insolvent laws of this country and of England.[2] "The reason is obvious," said Lord El-

[1] This is the rule adopted in *Maryland:* Third Nat. Bank v. Lanahan, 66 Md. 461, 7 Atl. Rep. 615; and *Nebraska:* State v. Nebraska Savings Bank, 40 Neb. 342, 58 N. W. Rep. 976.

[2] This was the rule under the recent bankrupt act of the United States, and under the act of July 1, 1898, 30 U. S. Stat. at Large 544, § 51. *In re* Bridgman, 1 N. Bank. R. 312; *In re* Brand, 3 N. Bank. R. 324; *In re* Newland, 7 N. B. R. 477, 6 Ben. 342; *Ex parte* Farnsworth, 1 Lowell 497; *Re* Babcock, 3 Story 393, 2 Fed. Cas. No. 696; *In re* Hamilton, 1 Fed. Rep. 800; *In re* Falls City Shirt Manuf. Co., 98 Fed. Rep. 592.

Alabama: Gusdorf v. Ikelheimer, 75 Ala. 153; Philadelphia Warehouse Co. v. Anniston Pipe Works, 106 Ala. 357, 18 So. Rep. 43.

Connecticut: In re Waddell-Entz Co., 67 Conn. 324, 35 Atl. Rep. 257; G. S. 1888, § 590, which provides for a valuation of the security; *In re* Greeley, 70 Conn. 494, 40 Atl. Rep. 233.

Illinois: Levy v. Chicago Nat. Bank, 158 Ill. 88, 42 N. E. Rep. 129; Furness v. Union Nat. Bank, 147 Ill. 570, 35 N. E. Rep. 624.

Iowa: Wurtz v. Hart, 13 Iowa 515; Dickson v. Chorn, 6 Iowa 19, 71 Am. Dec. 382.

Kentucky: Spratt v. First Nat. Bank, 84 Ky. 85; see, however, § 587, and Tod v. Kentucky Union Land Co., 57 Fed. Rep. 47.

Maryland: Third National Bank v. Lanahan, 66 Md. 461, 7 Atl. Rep. 615; National Union Bank v. National Mechanics' Bank, 80 Md. 371, 30 Atl. Rep. 913.

Massachusetts: Amory v. Francis, 16 Mass. 308; Farnum v. Boutelle, 13 Metc. 159; Sohier v. Loring, 6 Cush. 537; Richardson v. Wyman, 4 Gray 553; Haverhill Loan & Fund Asso. v. Cronin, 4 Allen 141, 144; Middlesex Bank v. Minot, 4 Met. 325; Lanckton v. Wolcott, 6 Metc. 305; Merchants' Nat. Bank v. Eastern R. Co., 124 Mass. 518; Third Nat. Bank v. Eastern R. Co., 122 Mass. 240; Costelo v. Crowell, 134 Mass. 280; Washburn v. Tisdale, 143 Mass. 376, 9 N. E. Rep. 741; Miller's River Nat. Bank v. Jefferson, 138 Mass. 111; Franklin Co. Nat. Bank v. First Nat. Bank, 138 Mass. 515; Union Cattle Co. v. International Trust Co., 149 Mass.

don.[1] "Till his debt has been reduced by the proceeds of that sale, it is impossible correctly to say what the actual amount of it is, and with this further consideration, that in the event of any doubt attaching upon his right to retain the security, he is enabled in a contest with the rest of the creditors to sustain his disputed title in a situation of predominant advantage." But it is a disputed point whether this rule is altogether one of statute, or whether it is founded upon principles of equity, and is therefore applicable to cases not governed by the statute, such as voluntary assignments by insolvent debtors in trust for the benefit of their creditors. Thus, on the one hand, the statute rule in bankruptcy was applied in Massachusetts to the settlement of estates of deceased insolvent debtors, the court saying:[2] "The rule adopted by the court of chancery in England, and enforced by the commissioners of bankruptcy, is certainly just and equitable; requiring that every creditor having a mortgage or other security, shall, before he is admitted to prove his debt, surrender his security for the benefit of the other creditors, the proceeds of the sale going into the common fund; or shall suffer the pledge to be sold, taking the proceeds towards his debt, and proving under the commission for the residue. If it were not so, the equality intended

492, 21 N. E. Rep. 962; White v. White, 169 Mass. 52, 47 N. E. Rep. 499; Hale v. Leatherbee, 175 Mass. 547.

Minnesota: Swedish-American Nat. Bank v. Davis, 64 Minn. 250, 66 N. W. Rep. 986, 69 Minn. 181, 72 N. W. Rep. 62.

Nebraska: State v. Nebraska Sav. Bank, 40 Neb. 342, 58 N. W. Rep. 976.

New Jersey: Bell v. Fleming, 12 N. J. Eq. 490; Pattberg v. Pattberg, 55 N. J. Eq. 604, 38 Atl. Rep. 205.

South Carolina: Wheat v. Dingle, 32 S. C. 473, 11 S. E. Rep. 394.

Vermont: International Trust Co. v. West Rutland Marble Co., 63 Vt. 326, 22 Atl. Rep. 273; Rogers v. Heath, 62 Vt. 101, 18 Atl. Rep. 1043.

Washington: *In re* Frasch, 5 Wash. 344, 31 Pac. Rep. 755.

[1] *Ex parte* Smith, 2 Rose 63; White v. Simmons, L. R. 6 Ch. 555; *Ex parte* Macredie, L. R. 8 Ch. 535; *In re* Oriental Commercial Bank, L. R. 7 Ch. 99; Greenwood v. Taylor, 1 Russ. & M. 185; *In re* Blakely Ordnance Co., L. R. 8 Eq. 244; *In re* Coal Consumers' Asso., 4 Ch. D. 625, per Malins, V. C.; *In re* Knott, 7 Ch. D. 549, note; *In re* London, Windsor & Greenwich Hotel Co. [1892], 1 Ch. 639; Glanville v. Strachan, 29 Ont. 373; Benning v. Simpson, 20 S. C. Can. 110.

[2] Amory v Francis, 16 Mass. 308.

to be produced by the bankrupt laws would be grossly violated; and the creditor holding the pledge would, in fact, have a greater security than that pledge was intended to give him. For originally it would have been security only for a proportion of the debt equal to its value; whereas by proving the whole debt, and holding the pledge for the balance, it becomes security for as much more than its value as is the dividend which may be received upon the whole debt."

In a recent case the court of appeals of Maryland forcibly stated this view of the question, Mr. Justice Boyd, for the court, saying: "The creditor who holds collateral securities for his claim has the advantage over other creditors to the extent of their value, or what he may realize upon them, but he should not be permitted to have, in addition thereto, what in many cases might be equivalent to double dividends or even more. If, for example, the collaterals realized fifty per centum of the creditor's claim, and the debtor's estate would only pay fifty cents on the dollar, the creditor with the security would be paid in full, whilst the others would receive only one-half of their claims. Great inconvenience and cost would oftentimes follow the practice contended for in the distribution of insolvent estates, in addition to the undue advantage given the creditor holding the collateral. For, if the whole claim be distributed to, and the dividend exceeded the difference between, the value of the collaterals and the amount of the claim, the creditor would have to refund or deduct from his dividend the balance, which would require another audit, thus involving the estate in unnecessary cost and delay. The value of the collaterals would have to be ascertained before the dividend was paid to the creditor, so as to properly protect the insolvent estate, for if this be not done, and the dividend was more than the difference between the value of the collaterals and the amount of the claim, the trustee would have to look to the creditor holding the collaterals for the excess paid him, and possibly the estate would sustain loss by not being able to recover the amount.'"[1]

[1] National Union Bank v. National Mechanics' Bank, 80 Md. 371, 382, 30 Atl. Rep. 913.

But it is obvious that this rule can have no proper application to a case where the collateral security is furnished by a third person not primarily responsible for the debt, but as a surety; because, if the security were first applied to the reduction of the debt, it would *eo instanti* create a new debt of equal amount in favor of the surety whose property is thus expended.[1]

And so if a debtor die and his estate be declared insolvent, a creditor who holds property of such debtor in pledge can not prove his claim against the estate until he has first sold the property and deducted the proceeds from his claim, or until the value of the property has been ascertained, by a jury or otherwise, and that value deducted. Proof can only be made for the remainder of the claim after deducting the value of the security as ascertained in one mode or the other.[2]

A creditor after having his collateral security appraised, and proving his debt for the balance, may then proceed to collect or enforce the collaterals; and his right to do so is not affected by the fact that these were appraised at a nominal value.[3]

§ 588a. **In one state it is provided that when a creditor has a mortgage or pledge of real or personal estate of the debtor,** or a lien thereon, for securing the payment of a debt claimed by him, the property so held as security shall, if he requires it, be sold, and the proceeds applied towards the payment of his debt, and he shall be admitted as a creditor for the residue. If the creditor does not require such sale and join in effecting the conveyance, he may release and deliver up to the assignee the premises held as security, and be admitted as a creditor for the whole of his debt. If the property is not so sold, or released and delivered up, the creditor shall not be allowed to prove any part of his debt.[4]

[1] Savage v. Winchester, 15 Gray (Mass.) 453.

[2] Middlesex Bank v. Minot, 4 Metc. (Mass.) 325.

[3] Streeper v. McKee, 6 Weekly Notes Cas. 169, 86 Pa. St. 188. This case arose under the United States Bankrupt Act.

[4] Massachusetts Pub. Stats. 1882, c. 157, § 28. This statute was first enacted in 1838, c. 163, § 3.

Under this statute it is now held that a creditor may prove his whole claim in insolvency against the estate of a debtor, although the debtor has assigned to him as security a mortgage made by a third person. In such case the creditor has no mortgage or pledge of the estate of the debtor against whom he offers proof.[1] Mr. Justice Barker, for the court, says: "Until the creditor receives full payment of the note, neither the insolvent, the assignee, nor the general creditors, have an equitable right to prevent the creditor from realizing by means of his security the full payment of his debt. Where the creditor by means of his security and his proof receives his whole debt, his rights in the security and in the estate of the insolvent stop. If at the outset the value of the security and the value of the assets of the insolvent estate, as compared with the amount of the claims provable against it, are such as to show that the creditor will receive from both his funds more than the amount of his debt, the facts disclose an equitable right in the security on the part of the insolvent estate, which may be enforced by a restraint in the proof without doing injustice, perhaps, to the creditor. But when it is not shown that such a state of facts exists it is not necessary for the preservation of the equitable rights of the insolvent and his assignee and other creditors that the creditor be restrained in his proof. * * * If at any time it appears that equitable relief is necessary to enable the assignee or the general creditors of the insolvent to enjoy their equitable rights of subrogation to the creditor's security, such relief can be afforded after as well as before proof of the debt in full."

As against the insolvent estate of a deceased person, a creditor holding as security for his debt a mortgage given by the deceased upon his own property is allowed to claim only the difference between his debt and the value of the property mortgaged.[2]

[1] Hale v. Leatherbee, 175 Mass. 547, 556, 56 N. E. Rep. 562, in effect overruling Lanckton v. Wolcott, 6 Met. 305, and Richardson v. Wyman, 4 Gray 553.

[2] Amory v. Francis, 16 Mass. 308; Hooker v. Olmstead, 6 Pick. 481; Towle v. Bannister, 16 Pick. 255; Middlesex Bank v. Minot, 4 Met. 325;

§ 588b. **Under bankruptcy and insolvency laws, it is generally provided that property held in pledge may be sold** by order of court when the creditor requires it.[1] When, however, the creditor's title is only equitable, as where he holds certain bonds of a corporation issued to a trustee for the payment of its indebtedness, secured by a mortgage of its property, a court of bankruptcy or insolvency having no jurisdiction over such trustee, the creditor is obliged to resort to a court of equity to compel a sale by the trustee under the mortgage, and the payment to him of a due proportion of the proceeds. If the mortgage contains a power of sale, the sale should be ordered in accordance with the terms of the power.[2]

§ 588c. **If a creditor holding collateral security inadvertently and by mistake, either of law or fact, proves his whole debt** against the insolvent estate without disclosing his security, and, before he has derived any advantage, or the other creditors have suffered any detriment from his act, takes proper measures to waive his proof and to pursue his rights as a secured creditor according to the statute, he does not waive his security, and the unsecured creditors do not acquire an equitable right to it which can be enforced by the assignee of the estate.[3]

§ 588d. **A creditor holding notes of his debtor as security for other notes of the same debtor, can make only a single proof** against his debtor's estate in bankruptcy or insolvency.[4]

Gray v. Coffin, 9 Cush. 192, 201, 202; Savage v. Winchester, 15 Gray 453; Haverhill Loan and Fund Asso. v. Cronin, 4 Allen 141; Merchants' Nat. Bank v. Eastern R. Co., 124 Mass. 518, 524; Bristol County Sav. Bank v. Woodward, 137 Mass. 412; Franklin County Nat. Bank v. First Nat. Bank, 138 Mass. 515, 522; Washburn v. Tisdale, 143 Mass. 376, 9 N. E. Rep. 741. And see White v. White, 169 Mass. 52, 47 N. E. Rep. 499.

[1] As in Massachusetts Pub. Stats. 1882, c. 157, § 28.

[2] Merchants' Nat. Bank v. Greene, 150 Mass. 317, 23 N. E. Rep. 103.

[3] Nichols v. Smith, 143 Mass. 455, 9 N. E. Rep. 810.

[4] Hale v. Leatherbee, 175 Mass. 547, 56 N. E. Rep. 562; Merchants' Nat. Bank v. Eastern R. Co., 124 Mass. 518; Third Nat. Bank v. Eastern R. Co., 122 Mass. 240.

The holder of negotiable paper upon which two or more parties are liable to him, may prove his whole claim in bankruptcy or insolvency against the estate of either, without regard to the fact that he has also the liability of the other parties as another fund to which he can resort for payment.[1]

If a debtor pledges his own note or bond to secure his own debt, the creditor can not collect on all the obligations more than the debt really due. In bankruptcy or insolvency the creditor is not allowed to prove the principal debt without surrendering the debtor's other obligations held as collateral security, unless these obligations are themselves secured by a lien on property or by obligations of third persons. If the creditor, before the commencement of proceedings in bankruptcy or insolvency, had collected any of the collateral obligations, he may prove the remainder of the debt after crediting the amount collected. But if, after such proceedings have been commenced, the creditor sells any of such collateral obligations of his debtor not so secured, the purchaser will be excluded from proving them, and the creditor will be excluded from proving even the remainder of its debt after deducting the proceeds of the debtor's obligation sold.[2] A sale of the debtor's collateral obligation does not enlarge the creditor's rights.[3] A debtor's additional promises to pay can not, from the very nature of the case, be treated as collateral security for his debt, unless such additional promises are themselves secured by a lien on property or by the obligations of third persons; under such circumstances they may be treated as

[1] Dickinson v. Metacomet National Bank, 130 Mass. 132, 136; Fuller v. Hooper, 3 Gray (Mass.) 334, 342; Sohier v. Loring, 6 Cush. (Mass.) 537, 548.

[2] Union Cattle Co. v. International Trust Co., 149 Mass. 492, 498, 21 N. E. Rep. 962, citing Third Nat. Bank v. Eastern R. Co., 122 Mass. 240; Merchants' Nat. Bank v. Eastern R. Co., 124 Mass. 518; *Ex parte* Farnsworth, 1 Lowell 497; *In re* Oriental Commercial Bank, L. R. 7 Ch. 99; *Ex parte* Macredie, L. R. 8 Ch. 535; Costelo v. Crowell, 134 Mass. 280.

[3] *In re* Waddell-Entz Co., 67 Conn. 324, 35 Atl. Rep. 257; People v. Remington, 54 Hun 480, 8 N. Y. Supp. 31, affirmed 121 N. Y. 675, 24 N. E. Rep. 1095.

collateral security so far as is necessary to obtain the benefit of the lien or obligation.'"[1]

But aside from the rules of bankruptcy or insolvency, the debtor's collateral obligation may be collected or sold, according to its nature. A Wyoming cattle company issued unsecured negotiable coupon bonds, payable in ten years from date, and shortly afterward deposited some of the bonds with a trust company here, under an agreement that they should be held as collateral security for promissory notes given by the former to the latter for money lent. Subsequently the cattle company was declared insolvent, in proceedings in the Wyoming courts, and receivers were there appointed to wind it up. Upon default in the payment of the promissory notes, the trust company gave notice of its intention to sell the bonds held as security for the satisfaction of its claim. Upon a bill in equity brought in Massachusetts by the cattle company, the receivers and other bondholders to enjoin the sale, it was held that the sale of the bonds would not be enjoined. Mr. Justice Field, delivering the judgment of the court, said: "It is not a reasonable construction of the contract of pledge in this case, that the parties intended that the trust company should be compelled to hold the bonds until they matured or were redeemed, if the notes were not paid at maturity. The fact that the bonds are the obligations of the debtor is one circumstance to be considered; but it does not outweigh the fact that, to secure the benefit of the security at or near the time when the notes mature, it would be necessary to sell the bonds, and that the right to sell bonds of this character when held as security is one of the rights which a pledgee ordinarily has. We think that as between the parties the trust company has the right to sell at public auction the bonds held as collateral security, and to apply the proceeds to the payment of the notes.'"[2]

§ 588e. **Upon the bankruptcy of a trustee or pledgeholder the property does not pass to his assignee in bankruptcy** or to

[1] *In re* Waddell-Entz Co., 67 Conn. 324, 335, 35 Atl. Rep. 257, per Hamersly, J.

[2] Union Cattle Co. v. International Trust Co., 149 Mass. 492, 21 N. E. Rep. 962.

the assignee for the benefit of creditors, but must be surrendered to the pledgee or pledgor according to the right of the parties.

Upon the bankruptcy of the pledgee, the subject of the pledge must be returned to the pledgor upon the satisfaction of the debt or claim to secure which the pledge was made. When a special deposit of money was made with a bank as a pledge to secure it from loss in furnishing bail, the title to the deposit, subject to the liability secured, remains in the pledgor, and after the cessation of the liability an action by the pledgor lies to recover the deposit; and in case of the insolvency of the bank the pledgor is not remitted to the rights of a general creditor, but may recover the entire sum deposited out of the assets of the bank. The fact that moneys specially deposited in the bank by way of pledge were afterward wrongfully commingled and used as funds of the bank, without the knowledge or consent of the pledgor, can not be urged by the bank in defense as effecting any change in the contractual relations and rights of the parties.[1]

[1] Anderson v. Pacific Bank, 112 Cal. 598, 44 Pac. Rep. 1063.

CHAPTER XVI.

REMEDIES OF THE PLEDGEE AFTER DEFAULT.

I. *Suit Upon the Debt.*

§ 589. **In general.**—As with a mortgage so with a pledge, the creditor may upon default pursue any or all of his several remedies. The remedies upon a pledge are also similar to those upon a chattel mortgage. They are, 1, by action upon the debt secured; 2, by sale of the pledge at common law without judicial proceedings; 3, by sale under statutory provisions; 4, by sale under a decree of a court of chancery; 5, by sale under a special power of sale.[1]

The remedy by sale, however, does not apply in case of pledges of negotiable paper and other *choses in action*, which have no recognized market value, unless a special power of sale be given.[2]

§ 590. **The holding of collateral security for a debt does not impair or suspend the right of action upon the debt,** unless so agreed upon by the parties, whether the collateral be given at the time the debt was contracted or afterwards.[3] "If I pawn

[1] 1 Codes 1895, Civ. Code, § 3904.

[2] See Chapter xvii.

[3] South Sea Co. v. Duncomb, 2 Str. 919; Emes v. Widdowson, 4 Car. & P. 151; Whitwell v. Brigham, 19 Pick. (Mass.) 117; Beckwith v. Sibley, 11 Mass. 482; Cornwall v. Gould, 4 Mass. 444, 448; Whitaker v. Sumner, 20

goods to A for such a sum," says Chief Justice Holt, "A may have debt for the money, notwithstanding his having a pawn."[1] The pledgee may also have his remedy against the person of the debtor and arrest and imprison him upon execution for the debt, where that remedy is given, without impairing his right to enforce the pledge.[2] He may attach and levy upon other property of the debtor without forfeiting his pledge.[3] In short, in the case of a pledge just as in the case of a mortgage, the creditor may use any remedy he has against the debtor or his property for the collection of the principal debt, without destroying or impairing his security for the debt until it is actually paid.[4] A creditor is entitled to hold his securities, whatever they may be, until he gets his pay.[5] The securities belong to him, and he may enforce the debt without surrendering them.

§ 591. **The recovery of a judgment upon the principal debt does not affect the pledgee's right to hold and enforce a pledge** taken to secure that debt. Though the original debt is merged in the judgment, and is thenceforth evidenced by a higher security, the debt in fact remains in a new form and the property pledged for its payment still remains liable therefor.[6]

Pick. (Mass.) 399; Darst v. Bates, 95 Ill. 493; Wilhelm v. Schmidt, 84 Ill. 187; Cushman v. Hayes, 46 Ill. 145, 153; Rozet v. McClellan, 48 Ill. 345, 95 Am. Dec. 551; Archibald v. Argall, 53 Ill. 307; Dugan v. Sprague, 2 Ind. 600; Kemmil v. Wilson, 4 Wash. C. C. 308; Jones v. Scott, 10 Kan. 33; Bank v. Woodruff, 34 Vt. 89; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497; Lormer v. Bain, 14 Neb. 178, 15 N. W. Rep. 323; Butterworth v. Kennedy, 5 Bosw. (N. Y.) 143; Langdon v. Buel, 9 Wend. (N.Y.) 80, 83; Elder v. Rouse, 15 Wend. (N. Y.) 218; Sonoma Valley Bank v. Hill, 59 Cal. 107, 9 Rep. 68, 8 Pac. Coast L. J. 666; French v. McCarthy, 125 Cal. 508, 58 Pac. Rep. 154; Savings Bank v. Middlekauff, 113 Cal. 463, 45 Pac. Rep. 840.

[1] Anonymous, 12 Mod. 564.

[2] South Sea Co. v. Duncomb, 2 Str. 919; Morse v. Woods, 5 N. H. 297.

[3] Taylor v. Cheever, 6 Gray (Mass.) 146. Cleverly v. Brackett, 8 Mass. 150, to the contrary, is without support and is not good law.

[4] See Jones on Mortgages, § 1215; Jones on Chattel Mortgages, § 758.

[5] Lincoln v. Linde, 27 Abb. N. C. (N. Y.) 278, 280, 16 N.Y. Supp. 106, quoting text.

[6] Jones v. Scott, 10 Kan. 33; Smith v. Strout, 63 Me. 205; Charles v. Coker, 2 S. C. 122; Sonoma Valley Bank v. Hill, 59 Cal. 107, 9 Rep. 68, 8 Pac. Coast L. J. 666; Barnes v. Bradley,

The judgment for the debt need not contain a provision that the property pledged shall be surrendered upon satisfaction of the judgment.[1]

Neither does the creditor lose his right to hold the collateral security by suing the principal debt, recovering execution, and arresting the debtor thereon. It is of the very nature of collateral security that it may be resorted to for a satisfaction of the principal debt, if its payment shall not otherwise be obtained.[2]

The pledgee need not first exhaust the subject of the pledge before suing to recover the debt secured.[3] If the security of the pledge is first applied upon the debt, and a part of it then remains unpaid, an action to recover the remainder of the debt may be maintained, and other property attached, though it be provided by statute that there shall be no attachment when the debt is secured by a pledge.[4]

§ 591a. **No mere change in the form of the debt secured releases the collateral securing it.** Thus the renewal of the note evidencing the debt leaves the security unimpaired.[5] But if the note secured is renewed, and at the same time a new contract of pledge is made of the same security which was pledged in the original transaction, the surrender of the old note and the giving of the new contract of pledge afford *prima facie* evidence that the old note was paid and the old contract of pledge released in favor of the new note and the new pledge securing it.[6]

56 Ark. 105, 19 S. W. Rep. 319; West v. Carolina Life Ins. Co., 31 Ark. 476; Fairbank v. Merchants' Nat. Bank, 132 Ill. 120, 22 N. E. Rep. 524; Jenkins v. International Bank, 111 Ill. 462; Schneider v. Kirkpatrick, 80 Mo. App. 145.

[1] French v. McCarthy, 125 Cal. 508, 58 Pac Rep. 154.

[2] Smith v. Strout, 63 Me. 205; Morse v. Woods, 5 N. H. 297.

[3] Ehrlich v. Ewald, 66 Cal. 97, 4 Pac. Rep. 1062; Savings Bank v. Midlekauff, 113 Cal. 463, 45 Pac. Rep. 840; Sonoma Valley Bank v. Hill, 59 Cal. 107.

[4] Williams v. Hahn, 113 Cal. 475, 45 Pac. Rep. 815.

[5] Fairbank v. Merchants' Nat. Bank, 132 Ill. 120, 22 N. E. Rep. 524; Flower v. Elwood, 66 Ill. 438; Rogers v. School Trustees, 46 Ill. 428.

[6] Fairbank v. Merchants' Nat. Bank, 132 Ill. 120, 22 N. E. Rep. 524; Tucker v. Conwell, 67 Ill. 552.

The pledgor can not while the debt exists maintain an action for the recovery of the property pledged.[1]

§ 592. **The debt may be enforced though the pledge has been discharged by a tender** of the debt at its maturity, unless the debt be payable in specific articles of personal property, when a tender of such articles may discharge the debt, and the articles tendered will become the property of the creditor, and may afterwards be kept at his risk and expense. But ordinarily a tender does not relieve the debtor from his personal liability to pay the debt.[2]

§ 593. **The return of the pledge is not a condition to be performed before or concurrently with the payment of the debt secured.**[3] If one loans money upon the security of a gun, the lender may recover the amount of the loan, without first returning the gun.[4] Even an agreement that upon a partial payment of the debt a proportionate part of certain shares pledged to secure it shall be given up, is construed to mean that the shares are to be returned after the money is paid. The creditor may bring suit upon the debt without first returning the shares; though of course if he should not return the shares after payment of the debt or after judgment recovered upon it, trover would lie against him for their value.[5]

Even a covenant on the part of the pledgee not to sue until the securities shall be given up, can not be set up in bar to a suit by him brought before giving up the securities. The damages to be recovered for a breach of covenant not to sue within a limited time, may be much less than the demand; and it would therefore be unjust to allow the covenant to bar

[1] Hendrix v. Harman, 19 S. C. 483.

[2] § 542; Mitchell v. Roberts, 17 Fed. Rep. 776.

[3] Scott v. Parker, 1 Q. B. 809; Chapman v. Clough, 6 Vt. 123; Morse v. Woods, 5 N. H. 297, 300; Taylor v. Cheever, 6 Gray (Mass.) 146; First Nat. Bank v. O'Connell, 84 Iowa 377, 51 N. W. Rep. 162, quoting text; Burhans v. Squires, 75 Iowa 59, 39 N. W. Rep. 181; Donnell v. Wyckoff, 49 N. J. L. 48, 49, 7 Atl. Rep. 672.

[4] Lawton v. Newland, 2 Stark. 72.

[5] Scott v. Parker, 1 Q. B. 809.

the whole demand. Such a covenant is distinguished from a perpetual covenant not to sue, which is held to be a bar, to avoid circuity of action, as the damages, if cross actions were brought, would be the same.[1]

In California under a statute which in effect makes the stockholders in a corporation, as regards its creditors, principal debtors and not merely sureties, it is held that a pledgee of the corporation may maintain a suit against a stockholder although he still retains in his hands property which he has received from the corporation in pledge.[2]

§ 594. **There are some decisions that the pledgor can not set up in defense to a suit upon the debt a claim for the value of the pledge by way of set-off or recoupment.** There is no liability on the part of the pledgee to return the pledge till the debt is paid, and therefore at the time of making this defense there is nothing upon which the defendant could found a cross action; and a claim by way of set-off or recoupment can only be sustained for what the defendant could maintain such an action for. Recoupment can be availed of only when the liability of both parties arises out of the same transaction or from mutual and dependent covenants or agreements. The giving of a pledge may, perhaps, be a part of the transaction of creating the debt secured. The debt is a contract independent of the giving of the pledge, and complete in itself.[3]

The implied agreement on the part of the pledgee for the safe keeping and return of the pledge, is independent of the debt, and not a condition upon which the debt becomes payable.

In the absence of an agreement to resort first to the pledge, it is no defense to an action on the debt secured that the property pledged has greatly depreciated in value between the time of default and the commencement of the suit on the debt.[4]

[1] Foster v. Purdy, 5 Metc. (Mass.) 442.

[2] Sonoma Valley Bank v. Hill, 59 Cal. 107.

[3] Winthrop Savings Bank v. Jackson, 67 Me. 570, 24 Am. Rep. 56.

[4] Rozet v. McClellan, 48 Ill. 345, 95 Am. Dec. 551.

§ 595. **But under the procedure in several states the pledgor may sue on a conversion of the pledge** as a defense to an action for the debt; and he may take this defense by way of counter claim.[1] In a suit by a pledgee upon the debt he must account for the value of the pledged goods which with the consent of the debtor he has committed to a factor for sale and the factor has sold but has failed properly to account for. The amount rightfully due from the factor is to be considered in the nature of a fund provided by the debtor to be applied to the satisfaction of his indebtedness; but the creditor having dealt directly with the factor, it is his right and duty to require of the factor a full and just accounting.[2]

And in a suit against a pledgee for conversion of shares of stock pledged he may have the amount of the debt allowed in abatement of damages. "The loan of the money and pledge of the stock as collateral security are parts of the same transaction, and the value of the property wrongfully converted and the amount of the debt can both be as readily ascertained in the action by the pledgee for the debt as in the action by the pledgor for the conversion of the pledge. In view of the fact that transactions of borrowing money on collateral securities have become common, and in large amounts, and that the securities pledged are usually such as are negotiable, and the pledge effected by blank indorsements, public policy requires the protection of the borrower from the consequence of the wrongful disposition of the property pledged, as far as is consistent with rules of law and the forms of action. To deprive the creditor of all remedy for his debt, because by inadvertence he has made an unlawful disposition of the pledge—it may be of less value than the debt—would be unjust. Equally

[1] Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248; Cass v. Higenbotam, 27 Hun (N. Y.) 406, 100 N. Y. 248, 3 N. E. Rep. 189; Carrington v. Ward, 71 N. Y. 360; Haskell v. Africa, 68 N. H. 421, 41 Atl. Rep. 73; Barnes v. Bradley, 56 Ark. 105, 19 S. W. Rep. 319; Ambler v. Ames, 1 D. C. App. Cas. 191; Donnell v. Wyckoff, 49 N. J. L. 48, 7 Atl. Rep. 672; Scott v. Crews, 2 S. C. 522; Bank of British Columbia v. Marshall, 11 Fed. Rep. 19.

[2] Bigelow v. Walker, 24 Vt. 149, 58 Am. Dec. 156; Barnes v. Bradley, 56 Ark. 105, 19 S. W. Rep. 319.

unjust would it be to compel the debtor to pay the debt in full in the face of the wrongful disposition of the property pledged, and then put him to an action of trover against the same party, who may be insolvent and incapable of satisfying the judgment against him. The injustice that might be done to the pledgee in an action of trover for the wrongful conversion of the pledge—the debt for which it was pledged being unpaid—is obviated by allowing the amount of the debt in abatement of damages, on the theory that to that extent the property pledged has been applied to the pledgor's use. On the same principle the value of the pledge wrongfully converted may be treated as payment *pro tanto* or in full in an action for the debt.'"[1]

§ 596. **In an action upon a debt secured by collateral in such states it is incumbent upon the plaintiff to produce or restore the collateral,** or to account satisfactorily for its non-production;[2] and he can not absolve himself from this duty by showing that the collateral security has become worthless since it was deposited in his hands, because it does not follow that he may not have disposed of it for value before it became worthless.[3] For this reason it is, in such case, incumbent upon him to produce the identical securities deposited with him, and not merely other securities of the same kind, unless he can show that he has always had in hand other securities of the same kind of a sufficient amount to enable him to return to the pledgor at any time, upon demand, the securities deposited as collateral; for otherwise the pledgee may have sold the securities at their face value before their depreciation, and afterwards have replaced them with others purchased at a small price after their depreciation.

If a pledgee is unable to return the identical bonds received in pledge, the burden of proof is upon him to show that he has

[1] Donnell v. Wyckoff, 49 N. J. L. 48, 50, 7 Atl. Rep. 672.

[2] Stuart v. Bigler, 98 Pa. St. 80; Spalding v. Bank of Susquehanna Co., 9 Pa. St. 28; Bank of U. S. v. Peabody, 20 Pa. St. 454; Ocean Nat. Bank v. Fant, 50 N. Y. 474; Smith v. Rockwell, 2 Hill (N. Y.) 482.

[3] Stuart v. Bigler, 98 Pa. St. 80.

at all times since the pledge was taken had other bonds of the same kind on hand not required to meet other obligations. The fact that he has not the identical bonds in his possession when their return is demanded, is evidence which a jury may consider as tending to prove a conversion by him. This fact is enough to throw upon him the burden of showing what he did with the pledged securities, or of proving that he all the while had other securities of the same kind which he could return in place of those received.[1]

As security for a loan of money, the borrower deposited certain coupon bonds. The lender afterwards becoming insolvent made an assignment for the benefit of creditors, leaving his affairs in great confusion. His assignees failed to find among his assets the identical bonds deposited by the borrower, but discovered many other bonds of the same kind. The bonds, although at the time of their deposit of considerable value, had in the meantime become worthless. The borrower tendered to the assignees the full amount of his debt, demanding from them the bonds deposited by him. These they declared themselves unable to restore, but tendered instead a like number of the similar bonds found by them among the lender's assets. This tender the borrower refused to accept. In an action by the assignees against him to recover the amount of money loaned to him, it was held that there was evidence to go to the jury of a conversion of the bonds by the pledgee, and that if the jury found that there had been such conversion the plaintiffs were not entitled to recover without accounting to the pledgor for the proceeds of the bonds. It was held, further, that the burden was upon the plaintiffs to rebut the *prima facie* presumption that such a conversion had taken place, by either producing the bonds or satisfactorily accounting for their non-production, and that in case they failed to do this they were not entitled to recover. It was further held that the tender by the plaintiffs of the other bonds found among the lender's assets, of the same kind as those deposited by the borrower,

[1] Stuart v. Bigler, 98 Pa. St. 80, 84, per Paxson, J.

was not good, for the reason that there was no proof that those bonds had been continuously in the lender's possession from the time the loan was made, and therefore might have been purchased by him after they became utterly worthless.

It seems that if the bonds had been in the pledgee's possession from the time of the loan by him, the tender of them by his assignees would have been good, and the pledgor would have been bound to accept them.[1]

§ 597. **The pledgee may also maintain a suit for a deficiency** existing after applying the proceeds of the pledge to the payment of the debt.[2]

§ 598. **A pledgee is not obliged to present his claim to the administrator of the pledgor,** unless he seeks recourse against other property of the estate than that pledged.[3]

In Texas the holder of a mortgage or lien upon the property of a deceased debtor must prove his claim in the probate court, from which he may afterwards obtain an order for the sale of the property. But the holder of negotiable paper as collateral security is not a mere mortgagee or lienholder, who, in case of the death of his debtor, must prove his claim against the estate, and ask the aid of the probate court to enforce it. He has in his own hands the means of paying himself, and may, at any time after the principal debt is due, collect the collaterals when they become due, and appropriate the proceeds to the payment of the debt. If, however, the securities prove to be uncollectible, and the creditor be driven to treat them merely as personal property pledged to secure a debt, and to invoke the aid of the courts to realize upon the security, then the matter may come within the reach of the probate laws, and the creditor may be compelled to prove his claim, and have the securities administered by the probate court. But there is no provision of the probate laws which reaches a creditor who has in his own hands that which may be treated

[1] Stuart v. Bigler, 98 Pa. St. 80.

[2] Mauge v. Heringhi, 26 Cal. 577.

[3] *In re* Kibbe, 57 Cal. 407; *In re* Galland, 92 Cal. 293, 28 Pac. Rep. 287.

by him as so much money, and appropriated as such to the payment of a debt due him.[1]

In Arkansas it is provided by statute that upon the death of a pledgor the court, on the application of any person interested, may order the executor or administrator to redeem the property out of the assets in his hands, if it would be beneficial to the estate, and not injurious to the creditors; but if such redemption would be injurious to the estate or the creditors, or there should not be assets to redeem the property after the payment of debts, the court may order the interest of the deceased in such property to be sold at public auction.[2]

II. *Attachment of the Pledged Property.*

§ 599. **A pledgee generally waives his lien by attaching or levying upon the property** held in pledge in a suit upon the very debt which the pledge was given to secure.[3] But he may do this if he choose, and have the property levied upon and sold as property of the judgment debtor. In such case the purchaser, whether he be a third person or the judgment creditor, thereafter holds title by virtue of the sale, and not by virtue of the pledge.[4]

But a pledgee may attach property of the pledgor's other than that held in pledge without waiving or affecting his lien.[5]

It has been held, however, that property exempt from execu-

[1] Huyler v. Dahoney, 48 Tex. 234. The right of a holder of a trust deed or mortgage to sell under a power is suspended in case of the death of the mortgage debtor, by force of the probate laws. Jones on Mortgages, § 1792.

[2] Dig. 1874, § 183.

[3] Jacobs v. Latour, 5 Bing. 130; Citizens' Bank v. Dows, 68 Iowa 460, 27 N. W. Rep. 459; Legg v. Willard, 17 Pick. (Mass.) 140, 28 Am. Dec. 282; Whitaker v. Sumner, 20 Pick. (Mass.) 399; Buck v. Ingersoll, 11 Met. (Mass.) 226; Evans v. Warren, 122 Mass. 303; *contra*, Arendale v. Morgan, 5 Sneed (Tenn.) 703; Sensenbrenner v. Mathews, 48 Wis. 250, 3 N. W. Rep. 599.

[4] Sickles v. Richardson, 23 Hun (N. Y.) 559; Lincoln v. Linde, 27 Abb. N. C. (N. Y.) 278, 16 N. Y. Supp. 106; and see Arendale v. Morgan, 5 Sneed (Tenn.) 703; Wooldridge v. Holmes, 78 Ala. 568; Libby v. Cushman, 29 Me. 429.

[5] Whitwell v. Brigham, 19 Pick. (Mass.) 117.

tion, pledged to secure a debt, may, upon the recovery of a judgment upon the debt, be sold on execution.[1] The grounds of the decision are, 1st, that pledgor may waive such exemption, and effectually pledge such property; 2d, that the recovery of judgment upon the debt does not destroy or affect the lien of the pledge; and 3d, that it being conceded that the creditor might have given notice and sold the property himself, without judgment or execution, there could be no valid objection to a sale by an officer in the manner and form prescribed for sales upon execution, for no greater care is required in the sale of such property than is required in the sale of any personal property on execution. But in such case, is the sale made solely by virtue of the lien of the pledge, or merely by virtue of the seizure on execution? It would seem that it must be by virtue of the lien of the pledge, for the legal exemption would prevent a sale by virtue of the execution. A sale in this form, by virtue of the pledge, is so different from the sale of a pledge sanctioned by the common law, that its validity might well be doubted in a state where it has not been established by a decision of the highest court.

If a promissory note be placed in the hands of a sheriff as collateral security for the payment of an execution which he holds against the owner of the note, an attempt by the sheriff to hold the note under a void levy of the execution upon it will not operate as a waiver of the lien.[2]

§ 600. **If one holding goods in pledge in the hands of an agent attaches them for the same debt** secured by the pledge, he thereby relinquishes the lien of his pledge.[3]

And so, if the pledgee transfer the debt secured by the pledge without a transfer of the lien, and points out to his assignee the pledged property to be attached by him and other creditors, and no notice is given to the officer of the existence of any such lien, the pledgee, having thus put it beyond his power, or that

[1] Jones v. Scott, 10 Kan. 33.

[2] Fisher v. Meek, 38 Ill. 92.

[3] Swett v. Brown, 5 Pick. (Mass.) 178.

of his assignee, to restore the pledged property upon payment of the debt, is regarded as having waived his lien.[1]

The rule above stated may properly be limited to cases in which the pledgee intentionally seeks to create a lien on the same property by other means or another process. The payee of an accommodation note made by defendants deposited it with a bank, before maturity, as collateral security for his note to the bank, under a written agreement that the collateral note might, if the principal note was not paid at maturity, be sold at public or private sale, and the proceeds applied to the expenses of sale and the payment of the principal note. The principal note was put in judgment, and the judgment provided for the sale of the collateral note on special execution. By mistake a general execution was issued instead of a special one, and the note was sold thereon after maturity, and bid in by plaintiff. In this action to recover judgment on the note, it was held that the bank took the note as a pledge, before maturity, free from the equities which existed between the payee and the makers, and that its purchase of it, by mistake, under a general instead of a special execution, was not an attempt to acquire a title to it inconsistent with the lien which it before had, and thus a waiver of the lien, but only an attempt to enforce the first lien under the contract by which it was created, and that the bank was entitled to recover, regardless of the equities between the makers and the payee.[2]

The levy of an attachment by a pledgee upon property in the hands of the pledge-holder, and his consent to the levy of a similar attachment by another creditor of the pledgor, is not a waiver of the pledge, or of the pledge-holder's right of possession, as against purchasers having notice thereof, when such attachment is made on the ground of defendant's non-residence, and for the purpose of preventing the pledgor from fraudulently placing the property in the possession of his wife under a bill of sale.[3]

[1] Whitaker v. Sumner, 20 Pick. (Mass.) 399.

[2] Valley National Bank v. Jackaway, 80 Iowa 512, 45 N. W. Rep. 881.

[3] Marshall v. Otto, 59 Fed. Rep. 249.

§ 601. **But an attachment of the same goods by the pledgee on another demand,** with notice to the officer that he did not waive his lien, and also with notice to him to hold possession for the pledgee, and to maintain his lien, would not amount to a waiver.[1]

III. *Sale of the Pledge at Common Law.*

§ 602. **In general.** A pledgee of goods does not acquire an absolute title thereto simply by the failure of the pledgor to pay the debt or redeem the property at the time specified. His interest is a special property to retain the goods for his security. There is no forfeiture until the pledgor's rights are foreclosed.[2] In this respect a pledge differs from a chattel mortgage, under which the title of the mortgagee becomes absolute upon default.[3]

A sale of the pledge, according to the rules of the common law, is the usual method of foreclosing this lien, where the parties have not expressly agreed that the sale shall be made in a definite manner, under provisions which are usually termed a power of sale; and even where there is such a power of sale, the sale may be made according to the rules of the common law, unless the conditions prescribed in the power of sale are imperative. But both the common-law form of procedure and that which the parties have agreed upon must yield to statutory regulations, when these are imperative and not permissive merely.

§ 603. **It is a well-settled rule of the common law that a pledgee, upon default, may sell at public auction the chattel pledged,** without judicial process and decree of foreclosure, upon giving the debtor reasonable notice to redeem;[4] although

[1] Whitaker v. Sumner, 20 Pick. (Mass.) 399; Townsend v. Newell, 14 Pick. (Mass.) 332.

[2] Brownell v. Hawkins, 4 Barb. (N. Y.) 491; Mitchell v. Roberts, 17 Fed. Rep. 776, per Caldwell, J; Xenia Bank v. Stewart, 114 U. S. 224, 5 S. C. Rep. 845.

[3] Jones on Chattel Mortgages, § 699; Brown v. Bement, 8 Johns. (N.Y.) 96.

[4] Tucker v. Wilson, 1 P. Wms. 261; Lockwood v. Ewer, 2 Atk. 303, 9 Mod.

the old rule, existing in the time of Glanville, required a judicial sentence to warrant a sale, unless there was a special agreement to the contrary.[1] This right to sell upon default is implied in the contract of pledge, and does not depend upon any express stipulation.[2]

The sale must be at public auction, unless a private sale is authorized by agreement of the parties.[3]

A sale is at public auction when it is advertised so to be and it is held at a board of trade where such sales are frequently made, and in a room which, though not usually open to the public, is so open when the sale is made, and the sale is conducted by a duly licensed auctioneer.[4]

§ 604. **If the pledgor has only a limited interest in the thing pledged,** the pledgee can sell only the interest which was

275, 278; Pothonier v. Dawson, Holt 385; Kemp v. Westbrook, 1 Ves. 278; Pigot v. Cubley, 15 C. B. (N. S.) 701; Martin v. Reid, 11 C. B. (N. S.) 730; Vaupell v. Woodward, 2 Sandf. Ch. (N. Y.) 143; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62, 100; Garlick v. James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294; Cushman v. Hayes, 46 Ill. 145; Luckett v. Townsend, 3 Tex. 119, 49 Am. Dec. 723; Brightman v. Reeves, 21 Tex. 70; King v. Texas Banking & Ins. Co., 58 Tex. 669; Mauge v. Heringhi, 26 Cal. 577; Wilson v. Brannan, 27 Cal. 258; Union Trust Co. v. Rigdon, 93 Ill. 458; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497; De Lisle v. Priestman, 1 Browne (Pa.) 176; Earle v. Grant, 14 R. I. 228; Guinzburg v. H. W. Downs Co., 165 Mass. 467, 43 N. E. Rep. 195; Union Cattle Co. v. International Trust Co., 149 Mass. 492, 501, 21 N. E. Rep. 962; Washburn v. Pond, 2 Allen 474; Sharpe v. National Bank, 87 Ala. 644, 7 So. Rep. 106; Union Trust Co. v. Rigdon, 93 Ill. 458; McDowell v. Chicago Steel Works, 124 Ill. 491, 16 N. E. Rep. 854.

[1] 1 Reeves 161–163; Cortelyou v. Lansing, 2 Caines Cas. 200; Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248, per Jewett, J.

[2] Lockwood v. Ewer, 9 Mod. 275, 278; Jerome v. McCarter, 94 U. S. 734; Alexander, Loudon & Hampton R. Co. v. Burke, 22 Gratt. (Va.) 254.

A similar right to sell upon default exists in case of a chattel mortgage. Jones on Chattel Mortgages, § 707.

[3] Bendel v. Crystal Ice Co., 82 Cal. 199, 201, 22 Pac. Rep. 1112; Williams v. Hahn, 113 Cal. 475, 45 Pac. Rep. 815; Sharpe v. National Bank, 87 Ala. 644, 7 So. Rep. 106; Morgan v. Dod, 3 Colo. 551; Indiana & Ill. Cent. R. Co. v. McKernan, 24 Ind. 62; Wheeler v. Newbould, 5 Duer 29; Rankin v. McCullough, 12 Barb. 103; Little v. Barker, Hoffm. Ch. 487; Brown v. Ward, 3 Duer 660; Diller v. Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; Davis v. Funk, 39 Pa. 243, 80 Am. Dec. 519.

[4] Earle v. Grant, 14 R. I. 228.

transferred in pledge. The pledgor's interest may be such that the pledgee can not make any sale of the thing pledged, but can only continue to hold it. "He may have only an interest for life, or for a term of years, or he may have simply a lien, or a right by a former pledge; still he may pledge the property to the extent of his interest. But the pledgee in all such cases has no right to sell the property on the non-fulfillment of the contract, although he may pursue the proper course for the purpose, for the pledgor has no such right to confer. The pledgee must content himself, in such cases, with holding the possession of the property till his debt is paid, or the interest of his pledgor in the property has expired."[1] Accordingly, where a husband held, as trustee, certain chattels belonging to his wife, and she pledged them, with his consent, to secure a liability assumed by him, and a statute then provided that no transfer by a husband of the personal property of his wife should be valid unless she should join with him in a written conveyance of the same, it was questioned whether the pledgee could sell the property, because the sale, coupled with the pledge, might be regarded as amounting to a transfer of the property, and therefore invalid under the statute; but it was not doubted that the pledgee would have a right to hold the property without a sale.[2]

§ 604a. **A provision in regard to the order in which different securities for a debt shall be sold must be observed by the pledgee.** A pledgor of corporate stock may sue the pledgee for a conversion of it, if he has sold it in violation of an agreement that certain bonds pledged for the same debt by the corporation should be first resorted to in case of default, and it is immaterial that the stock is invalid because issued upon the payment of a less sum therefor than that required by statute.[3]

[1] Robertson v. Wilcox, 36 Conn. 426, 430, per Park, J.

[2] Robertson v. Wilcox, 36 Conn. 426, 430, per Park, J.

[3] Hinckley v. Pfister, 83 Wis. 64, 53 N. W. Rep. 21.

§ 605. **The pledgee's assignee has the same right to sell the pledge upon reasonable notice after default that the pledgee himself had.** The power to sell property pledged does not arise from any peculiar trust reposed in the original creditor, but is an incident to the pledge and a part of the security of the debt.[1]

A pledgor can not object to a sale of the property pledged by one acting as agent of the pledgee, on the ground that he was not authorized by the latter, when it appears that the agent acted upon an assumption of authority, and that the pledgee was aware of the sale and made no objection to it.[2]

§ 606. **A pledgee is not obliged to sell the pledge even when requested so to do by the pledgor,** for his only right is to redeem.[3] Therefore in a case where the pledgor demanded a sale of the greater portion of the property pledged upon an offer procured by him, and the pledgee refused to make the sale, and it also appeared that if the sale had been made and the money collected thereon, the proceeds of the sale would have paid the debt secured excepting a small sum, and the remainder of the property pledged would have sold for a greater sum than the balance remaining unpaid, but all the property was afterwards sold by the pledgee for a sum much less than the debt, leaving a deficiency to be paid by the debtor, it was held that the pledgee was not liable for the loss occasioned by his refusal to sell as requested, this refusal being made in the exercise of an honest judgment on his part.[4]

The parties may, however, by contract make it the duty of the pledgee to sell the property pledged within a specified time.[5]

[1] Loud v. Burke, 22 Gratt. (Va.) 254, 263, per Moncure, C. J.

[2] McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. Rep. 217, 31 C. C. A. 487.

[3] Simonton v. Sibley, 122 U. S. 220, 7 S. C. Rep. 1351; Badlam v. Tucker, 1 Pick. (Mass.) 389, 400; Robinson v. Hurley, 11 Iowa 410; Minneapolis & N. Elevator Co. v. Betcher, 42 Minn. 210, 44 N. W. Rep. 5; Furness v. Union Nat. Bank, 147 Ill. 570, 35 N. E. Rep. 624; Mueller v. Nichols, 50 Ill. App. 663; Cole v. Dalziel, 13 Ill. App. 23; Cooper v. Simpson, 41 Minn. 46, 42 N. W. Rep. 601, 4 L. R. A. 194.

[4] Field v. Leavitt, 5 J. & S. (N. Y.) 215; Savannah Bank & Trust Co. v. Hartridge, 73 Ga. 223. So under a chattel mortgage. Jones on Chattel Mortgages, § 702.

[5] Cooper v. Simpson, 41 Minn. 46, 42 N. W. Rep. 601, 4 L. R. A. 194.

§ 607. **There are two kinds of notice which a pledgee may be bound to give to the pledgor.** Notice of his intention to sell, and of the time and place of sale, is always necessary for the making of a binding sale of the property pledged, unless by agreement of the parties such notice has been expressly or impliedly waived. Again, if the debt secured is not one which becomes due at a fixed time, there may be no default upon the occurrence of which a sale of the pledge can be made until the pledgee makes demand of payment or gives notice of the occurrence of the event which constitutes a default; or it may be that the event upon which a default occurs is one peculiarly within the knowledge of the pledgee; or it may be that such event is one which it is his option to declare. In such cases, of course, there is no default until the pledgee makes demand of payment, or gives notice of the default.

§ 608. **A demand of payment may be necessary in some cases to create a default.**[1] Thus, when the default upon which a pledgee is authorized to sell arises upon a decline in price of the property pledged, or in other words when the debtor has agreed to maintain a certain margin of value in the security above the advances made upon it, it is the duty of the pledgee to give notice of any deficiency of margin that may have occurred, and to demand the making good of the margin, before proceeding to sell the pledged property. Thus, where a consignee of cotton made advances upon it under an agreement that the consignor would maintain a certain margin, and that the consignee might sell the cotton at public or private sale, in case there should be a decline in the market price of cotton so as to impair the margin, and the consignor should fail on demand to make it good, it was held that the consignee was bound to give notice of a decline and make an actual demand for the margin before selling.[2] It is true that in this case it

[1] Genet v. Howland, 45 Barb. 560; Dewey v. Bowman, 8 Cal. 145; National Bank v. Baker, 128 Ill. 533, 21 N. E. Rep. 510; Earle v. Grant, 14 R. I. 228. As to evidence of a demand made, see Carson v. Iowa City Gas-Light Co., 80 Iowa 638, 45 N. W. Rep. 1068.

[2] Milliken v. Dehon, 27 N. Y. 364.

was expressly agreed that the default upon which the pledgee was authorized to sell the cotton should arise upon the failure of the pledgor to make good the margin upon demand. But this agreement of the parties merely expressed the rule of law which would have determined their rights had the agreement been silent in regard to a demand.

If the debt secured is not payable at a fixed time, a demand of payment, or that the pledge securing the debt be redeemed, should be made before the creditor can properly dispose of the pledged property. If in such case the debtor be absent or can not be found, judicial proceedings should be had to bar his right of redemption.[1] If the debt is expressly payable on demand the pledgee can not sell without first making demand.[2]

§ 608a. **What constitutes a default is determined by the contract of the pledge.** It may consist of the non-payment of the principal debt or of any installment of it or of interest upon it, when due, or it may be in the non-performance of an agreement to keep up a certain margin of security or any other agreement relating to the performance of the contract. Where the maker of a promissory note pledged as collateral security for the note certain shares of stock and a life insurance policy, and agreed to maintain on demand ten per cent. margin collateral security during the continuance of the note, "and upon the non-performance of this promise, or any part of it," he authorized the payee to sell the collateral security at any broker's board, or at public or private sale, at his option, it was held that the authority thus given to sell, upon "the non-performance of this promise, or any part of it," applied as well to the non-performance of the promise to pay the note at maturity as to the non-performance of the agreement to keep up the margin when so demanded, and a sale of the stock by the payee on the non-payment of the note was not a conversion to his own use.[3]

[1] Garlick v. James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294.

[2] Wilson v. Little, 1 Sandf. (N. Y.) 351.

[3] Manning v. Shriver, 79 Md. 41, 28 Atl. Rep. 899.

§ 608b. **Whether a pledgee has waived his right to insist upon a default,** by reason of accepting part payments, is a question of fact for the jury. Thus, if the owner of horses which have been boarded with a stable keeper executes an instrument by which he relinquishes to the latter all claim on the horses "until his claim of" a sum named "for board and care is paid in full, which I agree to do by weekly payments of" a certain sum, the transaction is in the nature of a pledge of the horses as security for the payment of the sum named at the weekly rate specified, and upon the failure of the pledgor to pay as agreed, the whole debt becomes due, and the pledgee can enforce his security by a sale of the property; and whether, by accepting payments after a breach of the agreement, he has waived his right to insist upon the payment of the whole debt, is a question for the jury in an action for conversion of the property.[1]

Of course, a pledgee can not proceed to sell the pledged securities after he has made a contract with the pledgor which in effect discharges the debt secured. Thus where bonds were transferred by the owner as security for payment by a railroad company of the purchase-price of rolling stock, the instrument by which the transfer was made providing that, in case of default, the rolling stock should be first sold, and the proceeds applied on the debt, and the bonds should be held as secondary security to make good any deficiency remaining, the contract shows that the intent of the parties was to constitute a pledge, and not a mortgage, of the bonds, and the pledgee lost all right to sell the same by making a settlement by which it took back the rolling stock and released the railroad company from further liability.[2]

§ 608c. **The contract of pledge may, however, provide for a sale of the securities pledged in certain contingencies before the debt secured is due,** as where the provision is that the pledgee may sell in case the securities depreciate in their market value.

[1] Radigan v. Johnson, 174 Mass. 68, 54 N. E. Rep. 358.

[2] Herrmann v. Central Car Trust Co., 101 Fed. Rep. 41.

What the contract is in such case and when the pledgee is authorized to sell are to be determined from the language used. But when the pledgee elects to sell the pledge before the debt is due, because of the happening of a contingency provided for by agreement, the pledgor is entitled to notice to redeem, and that the pledgee will not wait till the maturity of the debt. A sale without notice, in such case, will not pass the pledgor's right of redemption.[1]

§ 609. **The fact that the debt secured is payable at a future day certain, does not dispense with a want of notice** of the time and place of sale. The non-payment of the debt at maturity does not work a forfeiture of the pledge; it merely authorizes the pledgee to sell the pledge upon reasonable notice and to reimburse himself for the debt and expenses. As regards notice of sale there is no distinction between a pledge for a debt due presently and one for a debt due upon time. "In either case the pledgor is equally interested to see to it that the pledge is sold for a fair price. The time when the sale may take place is as uncertain in the one case as in the other; both depend upon the will of the pledgee, after the lapse of the term of credit in the one case, and after a reasonable time in the other; unless, indeed, the pledgor resorts to a court of equity to quicken a sale. Personal notice to the pledgor to redeem, and of the intended sale, must be given as well in the one case as in the other, in order to authorize a sale by the act of the party."[2] Thus a pledge of goods was made to secure a promissory note payable in four months. A few days afterwards the pledgor authorized the pledgee to sell a designated portion of the goods at public sale then about to occur at a certain place, and to apply the proceeds on the note. This privilege the pledgee did not avail himself of; but after the maturity of the note, without notice to the pledgor, he caused the goods to be sold at public auction at the same place at which the sale of a

[1] National Bank v. Baker, 128 Ill. 533, 21 N. E. Rep. 510.

[2] Stearns v. Marsh, 4 Denio (N. Y.) 227, 230, 47 Am. Dec. 248, per Jewett, J.

portion had been previously authorized; and thereupon brought suit against the pledgor for the balance due on the note. The sale was held to be tortious, and the pledgee a wrong-doer.[1]

§ 610. **A sale of the pledge can only be made after reasonable notice** to the pledgor of the time and place of sale, unless such notiee has been waived by agreement.[2] A sale without such notice constitutes a conversion.

[1] Stearns v. Marsh, 4 Denio 227, 230, 47 Am. Dec. 248.

[2] *England:* Tucker v. Wilson, 1 P. Wms. 261; Lockwood v. Ewer, 2 Atk. 303, 9 Mod. 275, 278.

United States: Leahy v. Lobdell, 80 Fed. Rep. 665.

Alabama: Sharpe v. Nat. Bank, 87 Ala. 644, 7 So. Rep. 106; Nabring v. Bank of Mobile, 58 Ala. 204.

California: Dewey v. Bowman, 8 Cal. 145; Gay v. Moss. 34 Cal. 125.

Colorado: Morgan v. Dod, 3 Colo. 551.

Connecticut: Stevens v. Hurlbut Bank, 31 Conn. 146.

Georgia: Waring v. Gaskill, 95 Ga. 731, 22 S. E. Rep. 659.

Illinois: McDowell v. Chicago Steel Works, 124 Ill. 491, 16 N. E. Rep. 854; Cushman v. Hayes, 46 Ill. 145; Rozet v. McClellan, 48 Ill. 345, 95 Am. Dec. 551; Belden v. Perkins, 78 Ill. 449; Stokes v. Frazier, 72 Ill. 428; National Bank v. Baker, 128 Ill. 533, 21 N. E. Rep. 510, 4 L. R. A. 586.

Indiana: Indiana & Ill. Cent. R. Co. v. McKernan, 24 Ind. 62; Evans v. Darlington, 5 Blackf. 320; Rosenzweig v. Frazer, 82 Ind. 342.

Massachusetts: Washburn v. Pond, 2 Allen 474; Parker v. Brancker, 22 Pick. 40; Middlesex Bank v. Minot, 4 Met. 325; Guinzburg v. H. W. Downs Co., 165 Mass. 467, 43 N. E. Rep. 195; Farrar v. Paine, 173 Mass. 58, 53 N. E. Rep. 146; Radigan v. Johnson, 174 Mass. 68, 54 N. E. Rep. 358.

Michigan: Féige v. Burt, 118 Mich. 243, 77 N. W. Rep. 928; Allen v. Dubois, 117 Mich. 115, 75 N. W. Rep. 443.

Minnesota: White v. Phelps, 14 Minn. 27, 100 Am. Dec. 190; Goldsmith v. Methodist Church Trustees, 6 Rep. 435.

Missouri: Chouteau v. Allen, 70 Mo. 290.

Montana: 1 Codes 1895, Civ. Code, § 3906.

Nebraska: Woodworth v. Hascall, 59 Neb. 124, 80 N. W. Rep. 483.

New Jersey: Morris Canal & Banking Co. v. Lewis, 12 N. J. Eq. 323.

New York: Garlick v. James, 12 Johns. 146, 7 Am. Dec. 294; Hart v. Ten Eyck, 2 Johns. Ch. 62, 100; Stearns v. Marsh, 4 Denio 227, 230, 47 Am. Dec. 248; Wheeler v. Newbould, 16 N. Y. 392; Bryan v. Baldwin, 52 N. Y. 232; Milliken v. Dehon, 10 Bosw. 325; Jaroslauski v. Saunderson, 1 Daly 232; Vincent v. Conklin, 1 E. D. Smith 203; Lewis v. Graham, 4 Abb. Pr. 106; Brown v. Ward, 9 How. Pr. 497, 3 Duer 660; Nelson v. Edwards, 40 Barb. 279; Ogden v. Lathrop, 65 N. Y. 158; Markham v. Jaudon, 41 N. Y. 235, 243; Toplitz v. Bauer, 34 App. Div. 526, 55 N. Y. Supp. 29; affirmed 161 N. Y. 325, 55 N. E. Rep. 1059;

The reasons assigned for the rule are that the pledgor should have an opportunity to attend the sale, and see that it is fairly conducted; that he may exert himself in procuring buyers, and thus enhance the price; and that he has the right to redeem the pledge at any moment before the sale is actually made, and should be afforded an opportunity to exercise this right.[1]

The right of redemption incident to every pledge would be valueless, if the creditor could in the absence of any agreement dispensing with notice of sale, sell the property pledged without demand of payment and without notice of the time and place of sale.[2]

A notice by advertisement in a newspaper is a sufficient notice in case it is shown that the pledgor saw the notice and attended the sale, though the notice did not give the names of the pledgor and pledgee, but the evidence indicated that the pledgor knew that the shares were his though it did not show that he had positive knowledge of this fact before the sale. In a case where such a notice had been given, and after the sale the pledgor was present with the pledgee and the purchaser when the latter made a payment on account of the purchase, and the three joined in a drink in celebration of the sale, it was declared by the court that as the pledgor after the sale, if not before, knew whose stock had been sold, and that as he made no objection then to the sale, he must be held to have ratified it.[3]

§ 611. **A waiver of the requirement of notice of the pledgee's intention to sell** and of the time and place of sale, may be made

Barber v. Hathaway, 62 N. Y. Supp. 329, 47 App. Div. 165.

Ohio: Bates v. Wiles, 1 Handy 532.

Pennsylvania: DeLisle v. Priestman, 1 Bro. 176; Davis v. Funk, 39 Pa. St. 243, 80 Am. Dec. 519; Conyngham's App., 57 Pa. St. 474; Richards v. Davis, 5 Clark (Pa.) 471; Diller v. Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177.

Texas: Lucketts v. Townsend, 3 Tex. 119, 49 Am. Dec. 723.

Virginia: Loud v. Burke, 22 Gratt. 254.

Wisconsin: Ainsworth v. Bowen, 9 Wis. 348.

[1] Milliken v. Dehon, 27 N. Y. 364, 373, per Marvin, J.

[2] Wilson v. Little, 2 N. Y. 443.

[3] Earle v. Grant, 14 R. I. 228.

by agreement of parties.[1] A waiver of the common law rule of notice is generally made when the parties agree upon a special power of sale; for under such a power it is usual either to waive notice of sale altogether, or else to provide for a special notice. Such notice is waived by giving the pledgee the option to sell at private sale. Under authority given a pledgee to sell at public or private sale, at his option, he may sell without notice in the usual manner of selling such property in the market.[2] Thus, a consignee of cotton made advances upon it to be paid at a day certain, under an agreement that should there be a decline in the market price of cotton, the consignor should, on demand, deposit cash sufficient to cover such decline; and in case he failed to do so, or to repay the advances at the day fixed upon, the consignee was authorized to sell the cotton at public or private sale, or otherwise at his option, for the most it would bring. The consignor having failed to make good a decline, the consignee sold the cotton by sample in the usual mode of selling cotton in the market, without giving notice of his intention or of the time and place of sale. It was held that he had a right so to do.[3] But the contract in this case was a peculiar one. It included more

[1] Montana Codes 1895, Civ. Code, § 3907, Williams v. Hahn, 113 Cal. 475, 45 Pac. Rep. 815; Williams v. United States Trust Co., 133 N.Y. 660, 31 N. E. Rep. 29; Loomis v. Stave, 72 Ill. 623; Thompson v. St. Nicholas Nat. Bank, 113 N. Y. 325, 21 N. E. Rep. 57; Kaufman v. Loomis, 110 Ill. 617; McDowell v. Chicago Steel Works, 124 Ill. 491, 16 N. E. Rep. 854; Union Trust Co. v. Rigdon, 93 Ill. 458; Cushman v. Hayes, 46 Ill. 145; Cole v. Dalziel, 13 Ill. App. 23; Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69; Mowry v. Wood, 12 Wis. 413; Murdock v. Columbus Ins. Co., 59 Miss. 152; Carson v. Iowa City Gas-Light Co., 80 Iowa 638, 645, 45 N. W. Rep. 1068; Union Nat. Bank v. Forsyth, 50 La. Ann. 770, 23 So. Rep. 917.

[2] McDowell v. Chicago Steel Works, 124 Ill. 491, 16 N. E. Rep. 854; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497; Jeanes' App., 116 Pa. St. 573, 585, 11 Atl. Rep. 862, quoting text; Williams v. United States Trust Co., 133 N. Y. 660, 31 N. E. Rep. 29, 45 N. Y. St. Rep. 232; affirming 38 N. Y. St. Rep. 701, 14 N. Y. Supp. 502. See § 631b.

[3] Milliken v. Dehon, 27 N. Y. 364, reversing 10 Bosw. 325; Genet v. Howland, 45 Barb. 560; Baker v. Drake, 66 N. Y. 518; Toplitz v. Bauer, 34 App. Div. (N. Y.) 526, 55 N. Y. Supp. 29; affirmed 161 N. Y. 325, 55 N. E. Rep. 1059.

than an ordinary pledge, and was construed according to its language and attendant circumstances.[1] Of course a private sale without notice may be made by the direction or with the consent of the pledgor, who can not afterwards object that the sale was not made in accordance with the requirements of a statute relating to sales of pledged property.[2]

An agreement that the pledgor shall have the right to determine the time when the sale shall be made, does not affect the legal character of the pledge. If the pledgee sells without the consent of the pledgor, and without notice to him of the time and place of sale, he is liable to the pledgor for the market value of the property at the time it was sold; but the pledgee is entitled to offset or recoup the amount of the debt secured. The pledgee's assignee, in such case, is subject to the same liability, and entitled to the same right of set-off.[3]

When a pledgee having authority to sell the pledge without notice to the pledgor, exercises this right, he is not bound to notify the pledgor of the grounds on which he exercises the power of sale.[4]

§ 611a. **Under a contract authorizing the pledgee to sell "at public or private sale at his discretion,"** the inference is that he may sell at public sale without giving notice, the contract saying nothing about notice. Thus, the owner of certain shares of stock pledged the same as security for the payment of his promissory note when payment should be demanded, and authorized, in writing, the holder to sell the same, either at public or private sale, in his discretion, if default should be made in payment for thirty days. Payment was demanded, and on default the holder sold the stock at public sale, adver-

[1] For a case where a contract which was more than a pledge and depended for its construction altogether upon its peculiar terms, see Murdock v. Columbus Ins. Co., 59 Miss. 152, where also it was held that the debtor was not entitled to a demand of payment, or to notice of the time and place of sale.

[2] Hamilton v. State Bank, 22 Iowa 306.

[3] Belden v. Perkins, 78 Ill. 449.

[4] McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. Rep. 217, 31 C. C. A. 487.

tised in a daily public newspaper. It was held that the sale was valid, and that the pledgor was not entitled to a personal notice of the time and place of sale.[1]

§ 611b. **A waiver of the right to dispose of a pledge without notice may be made by parol** and a consideration is not necessary to sustain it. Where a life insurance policy has been pledged as collateral to a promissory note under an agreement that in case of default in payment, "the legal holder of the said promissory note is hereby authorized to surrender to the company said policy, or to sell the same without demand and notice at public or private sale or otherwise," the right to dispose of the policy without notice may be waived by a subsequent understanding of the parties after default in payment, the legal effect of which is to entitle the pledgor to a notice before the pledgee may dispose of the policy.[2] A stipulation for the disposal of a pledge "may be affected by the subsequent conduct of the parties and by oral or written extensions of time, though not based on any actual pecuniary consideration. There is a class of contracts, of which we think this is one, where the mere indulgence of the creditor by a promise to extend the time, or by his conduct, will effect a change in the duties and obligations of the parties to each other, as prescribed by the original agreement. The contract of bailment, whereby personal property is deposited or pledged as security for a debt, creates duties and relations peculiar to itself. These duties and relations are governed more by the general maxims of equity than by the strict rules of the common law. It has been said that the pledgee occupies the position of a trustee for the owner, to pay the debt first, and then the surplus over to the pledgor. He is not permitted to deal with the trust property in such a way as to destroy or impair its value. It is quite certain that the law imposes duties upon the pledgee quite analagous to that existing in all trust relations. Origi-

[1] McDowell v. Chicago Steel Works, 124 Ill. 491, 16 N. E. Rep. 854.

[2] Toplitz v. Bauer, 34 App. Div. (N. Y.) 526, 55 N. Y. Supp. 29; affirmed 161 N. Y. 325, 55 N. E. Rep. 1059.

nally the property pledged could not have been disposed of without notice, and the pledgee was disabled from becoming the purchaser.'"[1]

§ 612. **The notice must be given to the general owner of the pledge or to his agent.** If notice be given to an agent who has no authority to act in the matter for the owner, the notice is without effect.[2]

Notice to the owner after the sale, though an opportunity be allowed him to redeem the pledge within a limited time, is of no effect. The pledgor might not be able to raise funds to redeem, while he might have been able to advance his interests in obtaining a higher price by procuring the attendance of bidders, and securing greater competition among purchasers; and he is entitled to have the opportunity of knowing that the sale was conducted in a proper manner.[3]

Notice of the time and place of sale left, in the absence of the pledgor, at his office, with a person in charge, is sufficient.[4] So is a notice, properly directed, sent through the postoffice.[5]

A notice without date and without signature left at the pledgor's office, would be insufficient.[6]

If the pledgee is unable to find the pledgor or any agent of his, he is not excused from giving notice, but should give notice under judicial proceedings.[7]

A sale without notice to the pledgor does not amount to a conversion of the pledged stock, if the shares are transferred by the purchaser back to the pledgee by indorsement of the

[1] Toplitz v. Bauer, 161 N. Y. 325, 332, 55 N. E. Rep. 1059, per O'Brien, J.

[2] Washburn v. Pond, 2 Allen (Mass.) 474.

[3] Washburn v. Pond, 2 Allen (Mass.) 474, per Dewey, J.

[4] Potter v. Thompson, 10 R. I. 1; Bryan v. Baldwin, 7 Lans. (N. Y.) 174, where is cited the rule declared by Shaw, C. J., in Granite Bank v. Ayers, 16 Pick. (Mass.) 392, "that all notices at one's domicil, and all notices respecting transactions of a commercial nature at one's known place of business, are deemed in law to be good constructive notice, and to have the legal effect of actual notice."

[5] Worthington v. Tormey, 34 Md. 182.

[6] Genet v. Howland, 45 Barb. (N. Y.) 560, 30 How. Pr. 360.

[7] Strong v. Nat. Mechanics' Banking Asso., 45 N. Y. 718. See, however, City Bank v. Babcock, Holmes 180.

certificate in blank, so that it is all the time within the power of the pledgee to return the stock to the pledgor upon the payment of the debts secured up to the time when the pledgee subsequently made a valid sale of the stock after giving due notice.[1]

§ 613. **Formal notice of the time and place of sale is not necessary if the pledgor has actual notice.**[2] "The only object of requiring notice to be given in such a case, is to inform the debtor of the time and place of sale; and when he is already otherwise fully informed on the subject, to require a further and more formal notice to be given him, is to require a vain thing. The case is not like a legal proceeding, in which service, or waiver of notice, should appear in the record. Here the whole matter is *in pais*, and the question is, did the debtor have actual notice of the time and place of sale. The safest course is to have a formal written notice served upon him, for then the fact of notice can be easily proved. If this safe course be not pursued, the creditor must, at his peril, be prepared to prove otherwise that the debtor was informed of the time and place of sale a reasonable time before the same was to take place."[3] In the case before the court it appeared that a written notice to redeem was given to the debtor, wherein he was notified that unless payment of the debt should be made on or before a certain day, the creditor would proceed to sell the property pledged, and apply the proceeds to the payment of the debt. The debtor having failed to pay the debt at the time named, the creditor proceeded directly to advertise a sale of the pledge in a newspaper; and that the debtor had actual knowledge of this advertisement appeared from the fact that a week before the sale he obtained an injunction against the sale, and his bill asking for the injunction recited a copy of the advertisement. He was held to have had actual and sufficient notice of the time and place of sale.

[1] Terry v. Birmingham Nat. Bank, 93 Ala. 599, 9 So. Rep. 299.

[2] Loud v. Burke, 22 Gratt. (Va.) 264; *Ex parte* Fisher, 20 S. C. 179.

[3] Loud v. Burke, 22 Gratt. (Va.) 264, per Moncure, C. J.

§ 614. **A notice of an intention to sell, without specifying time or place,** does not justify a sale.[1]

A notice by a pledgee that he will sell; unless a debt not secured by the pledge or an excessive sum be paid him immediately, does not justify a sale.[2]

The time and place of sale must be reasonable; but if the pledgor receives due notice of the time and place of sale, though both be unreasonable, he waives his right to make any objection to a sale made according to the notice, if he remains silent and makes no objection prior to the sale. Thus, where a pledge was made in Massachusetts of the stock of a Massachusetts corporation, and notice was given of a sale of the stock in New York where the stock was not known, it was held that the pledgor, who made no objection to the proposed sale, waived his right to object afterwards.[3] Where shares of stock were pledged as security for the payment of a promissory note, with power to sell the same at public or private sale, after the maturity of the note, the creditor frequently wrote to his debtor, stating that he must sell the stock unless something was paid on the note. About a year and a half after the maturity of the note, the payee wrote to the maker that he should sell the stock on a certain day, which was seven days later. The maker made no reply to this letter, and on the day named the payee sold the stock and applied the proceeds in part payment of the note. The old certificate was sent to the maker, who was the treasurer of the corporation issuing the the stock, and he, as treasurer, made the transfer on the books of the corporation, and issued a new certificate to the purchaser. About two years afterwards, the corporation sold out to another company of which the maker was also treasurer, and he, as treasurer, issued new stock to the purchaser in exchange for the old stock. The maker did not, at the time of

[1] Wheeler v. Newbould, 16 N. Y. 392; Goldsmith v. First Methodist Church, 25 Minn. 202.

[2] Pigot v. Cubley, 15 C. B. N. S. 701; Blood v. Erie Dime Sav. & L. Co., 164 Pa. St. 95, 30 Atl. Rep. 362.

[3] Guinzburg v. H. W. Downs Co., 165 Mass. 467, 43 N. E. Rep. 195.

these transactions, make any objection to the sale, or to the notice given to him, nor at any time before the action was brought, which was seven years after the sale. It was held that these facts would warrant a finding that the maker had waived any further notice of the sale than he had received.[1]

A policy of life insurance was pledged as collateral security for the payment of a promissory note, with power to sell the same at public or private sale. The maker of the notes, having been pressed for payment, wrote to the payee, fifteen months after the maturity of the note, that he could pay him a certain sum for the policy. The payee replied, that he had been offered a larger sum for it, and unless the maker could pay him that amount, he should sell it. The maker made no reply, and seven months later, the payee sold the policy for its value at that time, and notified the maker of the sale. He never made any objection or complaint for over seven years. It was held that these facts would warrant a finding that the maker had waived any further notice than he had received.[2]

§ 615. **An extension of the time of payment of the debt secured suspends the pledgee's right to sell the thing pledged** until the expiration of the extended time of payment; and the time of payment may be effectually extended by parol agreement.[3] If by any subsequent agreement between the parties, the stipulated time for payment has been rendered indefinite, it is not competent for the pledgee to sell until he has made a demand for payment.[4]

IV. *Statutory Provisions Regulating Sales of Property Held in Pledge.*

§ 616. **In general.**—In several states there are statutory provisions regulating sales of property pledged for the enforce-

[1] Downer v. Whittier, 144 Mass. 448, 11 N. E. Rep. 585.

[2] Downer v. Whittier, 144 Mass. 448, 11 N. E. Rep. 585.

[3] Wadsworth v. Thompson, 3 Gilm. (Ill.) 423.

[4] Pigot v. Cubley, 15 C. B. N. S. 701; Martin v. Reid, 11 C. B. N. S. 730.

ment of debts. These statutes differ materially; for while some of them exclude sales at common law or under powers of sale, others are permissive merely, and simply provide another mode of enforcing the lien, in addition to those sanctioned by the common law. In some states these statutory provisions apply only to pawnbrokers, other pledgees being left to pursue their common law remedies without restriction. In other states there are special provisions upon this subject applicable to pawnbrokers, in addition to the general provisions regulating sales by pledgees. No statement is made of the provisions applicable only to pawnbrokers. Under such statutes a borrower, who has contracted to pay a higher rate to a pawnbroker, can recover possession of the thing pawned upon a tender of the debt, with interest at the highest rate which the pawnbroker is allowed to charge.[1] And, of course, upon a sale by the pawnbroker he is entitled to retain interest only at the highest rate allowed by the statute.

The statutory mode of foreclosing a pledge does not exclude other forms of remedy unless the statute expressly so provides.[2]

§ 617. **Alabama.**[3]—On the maturity and non-payment of the debt, for the security of which collateral security or a pledge is taken and received, the creditor or the transferee of the debt may, after having given to the debtor, or person from whom such security or pledge was received, if he reside within the county, two days' notice in writing of the intention to sell (which notice may be left at his residence or place of business, or sent through the mail, postage prepaid), make sale at public outcry of such security or pledge, and on such sale may transfer or assign the same; and such transfer or assignment shall vest in the transferee or assignee all the right and title of the person from whom such security or pledge was taken or received, and all the right and title of the creditor or his assignee or transferee. Such sale may be made by the per-

[1] Jackson v. Shawl, 29 Cal. 267.

[2] Taft v. Church, 162 Mass. 527, 39 N. E. Rep. 283.

[3] Code 1896, §§ 948–950.

sonal representative of the creditor, or of the transferee of the debt. If the debtor or person from whom such security or pledge was received, do not reside within the county, notice of the intention to sell is not necessary.

Before making such sale, notice of the time and place thereof must be given for at least five days, by advertisement in some public newspaper published in the county, or if there be not a newspaper published in the county, by posting notices at the court-house door and three other public places in the county; such notice must describe the securities or property, but, without the consent of the debtor, or person giving the security or pledge, need not state his name, nor mention nor describe the debt for which such security or pledge was taken. Such sale may be made at the court-house door, or at such other public place as may be selected at which sales at public outcry are usual.

The surplus remaining after the payment of the debt must be paid to the debtor or his assignee, and if on demand the creditor fails or neglects to pay such balance, the same shall bear interest at the rate of five per cent. per month.

§ 618. **California,[1] Idaho[2] and South Dakota.[3]**—When performance of the act for which a pledge is given is due, in whole or in part, the pledgee may collect what is due to him by a sale of property pledged, subject to the rules and exceptions hereinafter prescribed. Before property pledged can be sold, and after performance of the act for which it is security is due, the pledgee must demand performance thereof from the debtor, if the debtor can be found. A pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgor to attend. Notice of sale may be waived by a pledgor at any time; but is not waived by a mere waiver of demand of performance. A debtor or pledgor waives a demand of performance as a condition precedent

[1] Civil Code, §§ 3000–3011.
[2] R. S. 1887, §§ 3418–3429.
[3] Annot. Stats. 1899, §§ 5609–5620.

to a sale of the property pledged, by a positive refusal to perform after performance is due; but can not waive it in any other manner except by contract. The sale by a pledgee of property pledged must be made by public auction, in the manner and upon the notice to the public usual at the place of sale in respect to auction sales of similar property,[1] and must be for the highest obtainable price. A pledgee can not sell any evidence of debt pledged to him, except the obligations of governments, states, or corporations; but he may collect the same when due.[2] Whenever property pledged can be sold for a price sufficient to satisfy the claim of the pledgee, the pledgor may require it to be sold, and its proceeds to be applied to such satisfaction, when due. After a pledgee has lawfully sold property pledged, or otherwise collected its proceeds, he may deduct therefrom the amount due under the principal obligation, and the necessary expenses of sale and collection, and must pay the surplus to the pledgor on demand. When property pledged is sold by order of the pledgor, before the claim of the pledgee is due, the latter may retain out of the proceeds all that can possibly become due under his claim until it becomes due. A pledgee, or pledge-holder, can not purchase the property pledged, except by direct dealing with the pledgor. Instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court, and in that case may be authorized by the court to purchase at the sale.

Whenever property pledged is sold at public auction, the pledgee or pledge-holder may purchase said property at such sale.[3]

[1] Where it appears that notices of auction sales of similar property were never for less than five days, and were usually from ten to twenty days, and that the property sold was of such a kind that but few persons would be likely to purchase it, and was purchased by the pledgee for about one-fifth of its actual value at an auction sale upon notice given for two days only, the sale is invalid. Bendel v. Crystal Ice Co., 82 Cal. 199, 22 Pac. Rep. 1112.

[2] This restriction is for the benefit of the pledgor and may be waived by him. McArthur v. Magee, 114 Cal. 126, 45 Pac. Rep. 1068.

[3] Stats. and Amend. to Codes 1895, c. 18, Civ. Code, § 3005.

§ 619. **Georgia.**[1]—The pawnee may sell the property received in pledge after the debt becomes due, and remains unpaid: but he must always give notice, for thirty days, to the pawnor of his intention to sell, and the sale must be in public, fairly conducted, and to the highest bidder, unless otherwise provided by contract.

§ 620. **Iowa.**[2]—Where chattel property is pledged as security for an indebtedness, unless provision is made by an agreement in writing therefor, the same may be sold for the non-payment of the indebtedness by giving the pledgor or any purchaser or assignee under him of the property, or any part of it, of which he has notice in writing, ten days' written notice of his intention to sell the same and make an application of the proceeds to the satisfaction of the debt, and posting for the same time in three public places in the township of such pledgor's residence a notice containing a full and accurate description of the property to be sold, the time and hour when, and the place at which, the sale will take place. If redemption is not made before the date thus fixed, the pledgee may sell at public auction, to the highest bidder, the pledged property, or so much of the same as may be necessary to pay the debt, interest, and all costs of making such sale, and may be a bidder at such sale. He shall apply the proceeds, *first*, in the payment of such costs, and *second*, to the payment of the debt. Any surplus arising from the sale and any property remaining unsold shall be paid or returned to the pledgor or his assigns.

Such pledgee may commence an action in equity for the foreclosure of such collaterals or pledges, and the court shall determine all issues presented as in other equity cases, and render judgment for the amount due from the pledgor, and award special execution for the sale of the collaterals or pledges and general execution for any balance, or shall render such judgment as may be necessary to carry out any written agreement of the parties concerning the subject-matter; but in all

[1] Code 1873, § 2140; 1895, § 2958. [2] Code 1897, §§ 4285, 4286.

cases a sale may be ordered unless there is a written stipulation to the contrary.

§ 621. **Louisiana.**[1]—The creditor can not himself, in case of failure of payment, dispose of the pledge; but where there have been pledges of stock, bonds, or other property, for the payment of any debt or obligation, it is necessary, before such stocks, bonds, or other property so pledged shall be sold for the payment of the debt for which such pledge was made, that the holder of such pledge be compelled to obtain a judgment in the ordinary course of law; and the same formalities in all respects shall be observed in the sale of property so pledged as in ordinary cases. Any provision which should authorize the creditor to appropriate the pledge to himself, or dispose of it, without the prescribed formalities, is null.

But a pledgee of a negotiable note may collect it by suit.[2]

§ 622. **Maine.**[3]—The holder of stocks, bonds, or any other personal property in pledge for the payment of money or the performance of any other thing, may, after failure to pay or perform, give written notice to the pledgor that he intends to enforce payment by a sale of the pledge; which notice shall be served by leaving a copy with the pledgor, if he resides within this state and his residence is known to the holder, otherwise by publishing it at least once a week for three successive weeks, in one of the principal newspapers in the city or town where the pledgee resides, or if there is no such paper, in one of the principal newspapers published in the county, or in the state paper. Such notice, together with an affidavit of service, shall be recorded in clerk's office of the city or town where the pledgee resides.

If the money to be paid or the thing to be done is not paid

[1] Voorhies' R. Civ. Code 1889 and 1870, art. 3165.

[2] Ducasse v. McKenna, 28 La. Ann. 419; Dolhonde's Succession, 21 La. Ann. 3.

[3] Acts 1875, c. 53; R. S. 1883, c. 91, §§ 57, 58.

or performed, or tender thereof made within sixty days after such notice is so recorded, the holder may sell the pledge at public auction, and apply the proceeds to the satisfaction of the debt or demand, and the expenses of the notice and sale, and any surplus shall be paid to the party entitled thereto on demand.

It is also provided[1] that no pawnbroker shall sell any property pawned until it has remained in his possession three months after the expiration of the time for which it was pawned; and all such sales shall be at public auction by a licensed auctioneer, and after notice of the time and place of sale. The name of the auctioneer, and a description of the property to be sold are published in a newspaper in the town where the property is pawned, if any, and if not, posted in two public places therein at least two weeks before the sale; and all sales of such property otherwise made, shall be wholly void, and the pawnbroker undertaking to make the same, shall forfeit twenty dollars for every such offense.

After deducting from the proceeds of any sale as aforesaid the amount of the loan, the interest then due, and the proportional part of the expenses of sale, such pawnbroker shall pay the balance to the person entitled to redeem such property if no sale had been made; and if not so paid on demand, he shall forfeit double the amount so retained, one-half to the use of the pawnor, and the other to the use of the state.

§ 623. **Massachusetts.**[2]—The holder of personal property in pledge for the payment of money or the performance of any other thing, may, after failure to pay or perform, give written notice to the pledgor that he intends to enforce payment or performance by a sale of the pledge, and such notice shall be served, and together with an affidavit of service be recorded in the clerk's office of the city or town where the pledgee resides, in the manner and with like effect as provided for notices of foreclosure.[3]

[1] R. S. 1883, c. 35, §§ 4, 5.

[2] P. S. 1882, c. 192, §§ 10–12.

[3] That is, the notice shall be served by leaving a copy with the pledgor or

If the money to be paid or other thing to be done is not paid or performed, or tender thereof made, within sixty days after such notice is so recorded, the pledgee may sell the pledge at public auction and apply the proceeds to the satisfaction of the debt or demand, and the expenses of the notice and sale, and any surplus shall be paid to the party entitled thereto on demand.

The preceding sections shall not authorize the pledgee to dispose of the pledge contrary to the terms of the contract under which it is held, nor limit his right to dispose of it in any other manner allowed by the contract or by the rules of law.[1]

§ 624. **Michigan.**—At any sale of property upon foreclosure of a pledge the pledgee or his assignees or legal representatives may fairly and in good faith purchase the property so offered for sale, or any part thereof.[2]

§ 625. **Montana.**[3]—Before property pledged can be sold, and after performance of the act for which it is security is due, the pledgee must demand performance thereof from the debtor, if the debtor can be found. A pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgor to attend. Notice of sale may be waived by a pledgor at any time; but is not waived by a mere

by publishing it at least once a week for three successive weeks in one of the principal newspapers, published in the town or city where the property is situated, or if there is no such paper, in one of the principal newspapers published in the county. The notice, with the affidavit of service, when recorded, or a copy of the record, may be admitted as evidence of the giving of such notice. P. S., c. 192, §§ 7, 8.

[1] This statute not only authorizes a sale of the thing pledged under a formal power of sale agreed upon in the contract of pledge, but also a sale in accordance with an informal or verbal consent of the pledgor given any time before the sale upon default. Covell v. Loud, 135 Mass. 41, 16 Cent. L. J. 471, 46 Am. Rep. 446.

The pledgee is not limited to the statutory proceeding in disposing of the pledge. Taft v. Church, 162 Mass. 527, 39 N. E. Rep. 283.

[2] 3 Howell's Annot. Stats. Supp. 1890, § 6200.

[3] Codes 1895, Civ. Code, c. 3, §§ 3905–3915.

waiver of demand of performance. A debtor or pledgor waives a demand of performance as a condition precedent to a sale of the property pledged by a positive refusal to perform, after performance is due, but can not waive it in any other manner except by contract. The sale by a pledgee, of property pledged, must be made by public auction, in the manner and upon the notice to the public usual at the place of sale, in respect to auction sales of similar property; and must be for the highest obtainable price. A pledgee can not sell any evidence of debt pledged to him except the obligations of governments, states or corporations; but he may collect the same when due. Whenever property pledged can be sold for a price sufficient to satisfy the claims of the pledgee, the pledgor may require it to be sold, and its proceeds to be applied to such satisfaction, when due. After a pledgee has lawfully sold property pledged, or otherwise collected its proceeds, he may deduct therefrom the amount due under the principal obligation, and the necessary expenses of sale and collection, and must pay the surplus to the pledgor on demand. When property pledged is sold by order of the pledgor before the claim of the pledgee is due, the latter may retain out of the proceeds all that can possibly become due under his claim until it becomes due. A pledgee or pledge-holder can not purchase the property pledged, except by direct dealing with the pledgor. Instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court; and in that case may be authorized by the court to purchase at the sale.

§ 626. **New Hampshire.**[1]—Any person having a lien on any personal property by pledge or otherwise, where no time is limited for the payment of the debt or redemption of the property, may sell the same, or so much thereof as is needful, at auction, notice thereof being given as hereinafter required, and from the proceeds reimburse himself for said debt and the

[1] Pub. Stats. 1901, c. 141, §§ 3-8.

expenses incident to such sale. If a time is limited for the payment of such debt or the redemption of such property, the property may be sold at any time after the expiration of said time upon like notice, provided such sale shall not be in conflict with the terms of the contract under which the property is holden. Notice of such sale shall be given by posting notices thereof in two or more public places in the town where such property is situate, fourteen days at least before the sale, and if the value of the property exceeds one hundred dollars, by publishing the notice. A notice of such sale shall be served upon the pledgor or general owner, if resident in the county, the same number of days before the sale, stating in writing the time and place of sale, the property to be sold, and the amount of the lien thereon. The balance of the proceeds of such sale, if any, after payment of the amount of such lien or pledge, and the reasonable expenses incident to such sale, shall be paid to the pledgor, general owner, or person entitled thereto, on demand. The holder of such lien shall cause a copy of such notices and affidavit of service, with an account of such sale and the fees and charges thereon, to be recorded in the books of the town where such sale is had, and a certified copy thereof may be used in evidence.

§ 627. **North Dakota.**[1]—A pledgee may collect when due any evidence of debt pledged to him; he may also sell any evidence of debt pledged to him to secure the performance of an original obligation, if at the time of making such original obligation the pledgor shall have authorized in writing such sale. Before such evidence of debt can be sold and after the maturity of the original obligation, the pledgee must demand, in writing, the performance thereof from the debtor if he can be found. Notice of the sale of such evidence of debt must be given by publication once, and at least six days prior to such sale, in a newspaper published at the place of sale, if there is one, otherwise in a newspaper in the county in which such sale is to be

[1] Acts 1897, c. 109.

made, and if there is no newspaper in the county, or upon the written request of the pledgor, notice shall be given by posting the same in five public places in such county for at least ten days prior to such sale. The notice of sale must specify the names of the pledgor and pledgee and the assignee, if any, the date, maturity and amount of the original obligation and the amount claimed to be due thereon, a description of the evidence of debt to be sold, which shall contain the names of the makers, the date and maturity of such obligation to be sold, and the time and place of sale. Such sale may be made by the pledgee, his agent or attorney. A report of such sale must be made and filed, substantially as required in chattel mortgage foreclosures, and when so filed shall have the same force and effect.

§ 628. **Rhode Island.**[1]—At any sale by public auction made under and according to the provisions of any pledge of stock or other personal property, or of any power of sale contained therein or annexed thereto, the pledgee, his or their assigns, or his or their heirs, executors or administrators, or any person for him or them, may fairly and in good faith bid for and purchase such estate or property so put up for sale, or any part thereof, in the same manner as the same may be bid for and purchased by any other person. Provided, that such pledgee shall sell at public auction, and shall advertise the sale at least twice a week in some public newspaper published in the city of Providence, not less than ten days in the case of a pledge of merely personal estate, and shall also in such public advertisement of sale give notice that it is his intention to bid upon such property so advertised for sale; and provided further, that nothing herein contained shall affect any contract as to bidding and purchasing, made between pledgor and pledgee.

§ 629. **South Carolina.**[2]—When any personal property under

[1] G. L. 1896, c. 207, § 16.

[2] R. S. 1893, § 2462. See Sellers v. Hancock, 42 S. C. 40, 20 S. E. Rep. 130.

pledge is to be sold for the purpose of satisfying the loan or debt secured by such pledge the pledgee shall advertise the time and place of sale by posting a notice thereof, in writing, at least fifteen days before such sale, in three public places in the county in which such personal property may be found, one of which shall be the court-house door, or shall publish the same at least two weeks in a newspaper published in his county, unless the person making such pledge, or his legal representative, shall consent, or shall have consented, to a sale in some other mode, or at some other notice, such consent to be expressed in writing.

§ 630. **Wisconsin.**[1]—Under the statute for enforcing liens, any bailee for hire, carrier, warehouseman or pawnee or lien-holder by the common law, may, in case the debt remain unpaid for three months and the value of the property affected thereby does not exceed one hundred dollars, sell such property at public auction and apply the proceeds of such sale to the payment of the amount due him and the expenses of such sale. Notice, in writing, of the time and place of such sale and of the amount claimed to be due shall be given to the owner of such property personally or by leaving the same at his place of abode, if a resident of this state, and if not, by publication thereof once in each week, for three weeks successively, next before the time of sale in some newspaper published in the county in which such lien accrues, if there be one, and if not, by posting such notice in three public places in such county. If such property exceed in value one hundred dollars, then such lien may be enforced against the same by action in any court having jurisdiction.

[1] 2 Gen. Stats. 1898, § 3347. An action to foreclose a lien upon a pledge of more than one hundred dollars value is of an equitable nature and not triable by jury, although personal judgment goes against the pledgor. An execution should not be issued until after the sale of the pledge, and then only on the order of the court for the deficiency, after applying the proceeds of the sale towards the payment of the amount of the lien. Wilson v. Johnson, 74 Wis. 337, 43 N. W. Rep. 148.

V. *Sales Under Powers of Sale.*

§ 631. **A power of sale, whether given in a mortgage, or in a pledge, is an authority coupled with an interest, and passes** to the pledgee's representatives.[1] Whatever remedy the creditor has for the enforcement of his security passes upon his decease to his representatives.[2] Such a power is not affected by an attachment of the property in a suit against the pledgor, nor by summoning the pledgee as a trustee or garnishee in such suit.[3]

The right of a trust company holding in pledge the second mortgage bonds of a railroad company, to sell them according to the terms of the pledge is not affected by the fact that as trustee under a first mortgage of the railroad company, it had commenced a foreclosure suit, and that a receiver had been appointed in that suit, or by the fact that the trust company had also become the owner of a majority of the first mortgage bonds.[4]

§ 631a. **Of course a default under the terms of the pledge must be shown.** What constitutes a default depends upon the contract of the parties, which is to be construed according to its sense and meaning as ascertained from the language used, and such language is to be understood in its ordinary sense, unless it has acquired a technical meaning and is used by the parties in a technical sense. Moreover, the whole contract is to be considered. Thus, one borrowed money upon his note secured by certain shares of stock and a life insurance policy, and agreed to maintain a ten per cent. margin on the collateral security "and on the non-performance of this promise, or any part of it, I authorize the pledgee to sell the collateral." It was held that the authority to sell related to the failure to pay the note as well as the failure to maintain such margin, and

[1] Jones on Mortgages, § 1792; Chapman v. Gale, 32 N. H. 141.

[2] Henry v. Eddy, 34 Ill. 508.

[3] Chapman v. Gale, 32 N. H. 141.

[4] Guaranty Trust Co. v. Galveston City R. Co., 87 Fed. Rep. 813, 31 C. C. A. 235.

that a sale for non-payment was not a conversion of the collaterals.[1]

§ 631b. **The power of sale may provide for a private sale or a sale at public auction,** and it may provide for a notice to the pledgor, or for a sale without notice. If by the terms of the power the pledgee has authority to sell on a breach of the contract of pledge without notice to the pledgor, he may, before such breach, make a valid agreement to sell the thing pledged when the contingency of a breach shall happen.[2]

If the power of sale, "at public or private sale," after default, is silent as to notice, it has in some cases been held that a sale without notice was intended.[3] But other authorities hold that in such case a waiver of notice can not be implied.[4]

Where a pledgee is empowered to sell collateral security upon the failure of the maker of the note to comply with its terms, and the option is given by which he can dispose of stocks, held as security, at public or private sale, and he chooses to make the sale public, he must conform to the rules governing public sales, so far as publicity is concerned. The power of sale must be exercised with a view to the interests of the pledgor as well as the pledgee, and the sale should not be forced for barely sufficient money to secure the payment of

[1] Manning v. Shriver, 79 Md. 41, 28 Atl. Rep. 899. The court, Robinson, C. J., said: "We are now dealing with a promissory note, to secure the payment of which at maturity the defendant pledges certain collateral securities, and, in addition thereto, he agrees to maintain on demand a margin of ten per cent. So there is not only a promise to pay the note when due, but also a promise to keep up a certain margin, and when the parties say that upon "the non-performance of this promise, or any part of it," the payee is authorized to sell the pledge, they mean upon the non-performance of either the promise to pay the note at maturity or the non-performance of the agreement to keep up the margin when so demanded. We can not suppose for a moment that the collateral security was pledged merely as a security for the maintenance of the margin."

[2] Taft v. Church, 162 Mass. 527, 39 N. E. Rep. 283.

[3] McDowell v. Chicago Steel Works, 124 Ill. 491, 16 N. E. Rep. 854.

[4] Ogden v. Lathrop, 65 N. Y. 158; Millikin v. Dehon, 10 Bosw. (N. Y.) 325; Haskins v. Patterson, Edm. Sel. Cas. (N. Y.) 120; Goldsmidt v. First M. E. Church, 25 Minn. 202. See § 611.

the debt, when the securities are known to be of more than double the value of the debt.[1]

§ 632. **Authority to sell collateral security is terminated by satisfaction of the principal debt.** Thus if a debt secured by a mortgage of chattels be further secured by a pledge of negotiable notes with a power to sell them upon default, and the mortgaged chattels be disposed of by the creditor in such a manner as to satisfy the debt secured, his subsequent sale of the collaterals under the power is unauthorized, and he is liable to account for their actual value irrespective of the price received for them. If, however, any part of the mortgage debt remains unsatisfied after the application to it of the mortgaged property, then a sale of the collaterals can be properly made, and the creditor in accounting for a surplus, is chargeable with only the sum for which the collaterals were sold.[2]

§ 633. **Where the subject-matter of a pledge is divisible,** the pledgee should not sell under a power of sale more of the property than is sufficient to pay the debt secured, and if he does so he may be responsible to the pledgor for the damages he may thereby sustain; such damages being the difference between the price for which the property, in excess of the amount required, was sold, and the price at which the pledgor could replace it.[3] It is declared that stronger reasons exist for the application of this rule in the case of pledges, than exist in the cases of mortgages or deeds of trust with powers of sale, because a pledge, unlike those securities, does not pass the legal title of the property, but only the possession of it, as security for the debt, and that the pledgee, in exercising the power of sale, acts strictly for the pledgor, in whom the legal title is still vested.[4]

[1] Foote v. Utah Commercial & Sav. Bank, 17 Utah 283, 54 Pac. Rep. 104. And see Nat. Bank v. Baker, 128 Ill. 533, 21 N. E. Rep. 510, 4 L. R. A. 586.

[2] Mowry v. First Nat. Bank, 54 Wis. 38, 11 N. W. Rep. 247.

[3] Fitzgerald v. Blocher, 32 Ark. 742, 29 Am. Rep. 3.

[4] Fitzgerld v. Blocher, 32 Ark. 742.

If several things are held in pledge the creditor upon default may sell either or any of them at his discretion from time to time till the debt is fully satisfied.

§ 634. **If the pledgor has mixed the articles pledged with others belonging to himself,** a sale of the whole will be valid and binding,[1] especially if the terms of sale are broad enough to cover the whole, as for instance when they embrace all the materials in a certain building.[2]

§ 635. **A pledgee can not directly or indirectly purchase at a sale of the pledge under a power,** unless it is specially provided by the terms of the power that he may do so. Nothing passes by the form of a sale, and the pledgee still holds the property, under his original lien as collateral security.[3] The title is still in the pledgor, and the pledgee is still liable to account for the property and to deliver it upon payment of the debt. But such a sale and purchase is no ground for nonsuiting the pledgee in an action subsequently brought by him

[1] Jones on Chattel Mortgages, §§ 155, 483.

[2] Clark v. Bouvain, 20 La. Ann. 70.

[3] Halliday v. Holgate, L. R. 3 Ex. 299; Donald v. Suckling, L. R. 1 Q. B. 585; Marsh v. Whitmore, 21 Wall. 178; Wardell v. Railroad Co., 103 U. S. 651, 658; Canfield v. Minneapolis Agr. & Mech. Asso., 4 McCrary 646.

See, also, Jones on Mortgages, §§ 1878–1888; Jones on Chattel Mortgages, §§ 806–815.

Colorado: Morgan v. Dod, 3 Colo. 551.

Illinois: Chicago Artesian Well Co. v. Corey, 60 Ill. 73; Killian v. Hoffman, 6 Bradw. 200; Stokes v. Frazier, 72 Ill. 428.

Indiana: Indiana & Ill. Cent. R. Co. v. McKernan, 24 Ind. 62.

Iowa: Bank v. Dubuque R. Co., 8 Iowa 277.

Maryland: Maryland F. Ins. Co. v. Dalrymple, 25 Md. 242, 89 Am. Dec. 779; Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 269; Bryson v. Rayner, 25 Md. 424; Manning v. Shriver, 79 Md. 41, 46, 28 Atl. Rep. 899.

Massachusetts: Lord v. Hartford, 175 Mass. 320, 56 N. E. Rep. 609; Middlesex Bank v. Minot, 4 Metc. 325; Blood v. Hayman, 13 Metc. 231; Day v. Holmes, 103 Mass. 306, 311.

Missouri: Greer v. Lafayette County Bank, 128 Mo. 559, 30 S. W. Rep. 319; Chouteau v. Allen, 70 Mo. 290; Thornton v. Irvin, 43 Mo. 153.

New York: Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190, 205.

Pennsylvania: Hestonville, etc., R. Co. v. Shields, 3 Brews. 257; Register v. Sellers, 4 Pa. Co. Ct., 490, 44 Leg. Int. 502.

to recover a balance of the debt secured; but ground only for charging the debtor in such suit with the full value of the property pledged.[1]

A pledgee of a mortgage who sells the mortgaged property for a sum less than the mortgage debt, and himself becomes the purchaser at the sale, and immediately resells it for a greater sum than the mortgage debt, is bound to account to the pledgor, not for the sum at which he purchased nor for the price at which he sold, but for the amount of the mortgage debt.[2] That is the extent of the pledgor's interest in the mortgage.

Where one pledged a second mortgage as security for a debt, the holder of the first mortgage afterwards brought a suit to foreclose his mortgage, and a decree was entered foreclosing both mortgages, the land being bought by a stranger. Sometime after this sale, the pledgee bought the land from the purchaser, the pledgor's attorney negotiating the sale and receiving a bonus. The pledgee afterwards sold the land at a profit. It was held that the pledgor could not recover from the pledgee out of such profits the amount of the note pledged. The purchase by the pledgee was made after his relations with the pledgor were wholly closed, and was an entirely independent transaction.[3]

The pledgor may lawfully stipulate that the pledgee may purchase at the sale of the property pledged. This stipulation may be made at the time of the pledge or afterwards.[4]

§ 635a. **Even in case the power of sale provides that the pledgee may purchase at the sale,** this will be held invalid if the sale was not advertised, and was conducted without regard to the pledgor's interest. A bank held $40,000 in notes, part of which were secured, as collateral to secure other notes under an agreement which provided for a public or private sale

[1] Duden v. Waitzfelder, 16 Hun (N. Y.) 337.

[2] Richardson v. Mann, 30 La. Ann. 1060.

[3] Raben v. First Nat. Bank, 37 Neb. 364, 55 N. W. Rep. 1055.

[4] Appleton v. Turnbull, 84 Me. 72, 24 Atl. Rep. 592.

of such notes, and that the bank could purchase such notes in its own name. The bank turned the collection of such collateral over to an agent, who published notices of a public sale for four days prior to the sale which did not show the authority to make the sale, that it was made by the bank, to whom the notes belonged, or the terms of the sale. A similar notice, but stating that the sale was made by the bank, was given to the pledgor. The weather being inclement on the day of sale, this was held inside the storm doors of the courthouse, and out of public view, instead of at the door thereof, as advertised. But few persons were present at the sale, and the bank purchased the collateral for $8,825, which was an inadequate consideration. It was held that the sale was invalid for want of proper notice, and moreover that it should be set aside, because the bank was under the circumstances bound to continue the sale.[1] Robinson, J., for the court said: "Having power, under the exercise of a sound discretion, it was the clear duty of the bank to adjourn the sale in order to prevent a sacrifice of the securities, and obtain a fair price therefor.[2] The trust relation occupied by the bank towards the pledgor, made it incumbent upon the former to obtain the best possible price, and to use every reasonable means to obtain the full value of the pledged property. The condition of the weather and the absence of any considerable number of bidders rendered an adjournment necessary in order to prevent a sacrifice of the securities. In view of the character of the securities sold, consisting of numerous notes secured by sundry deeds of trust on different lots of land, we do not think the bank exercised a proper discretion in selling on four days' notice. The notice given was wholly inadequate to enable prospective purchasers to investigate into the value of the securities offered. In the sale of the collateral in question, the amount to be realized therefrom is governed, to a great extent at least, by the value of the property embraced in the deeds of trust securing the same. Consequently, time and opportunity should have

[1] Laclede Nat. Bank v. Richardson, 156 Mo. 270, 56 S. W. Rep. 1117.

[2] Jones Mortgages, § 1873.

been given for an examination of the notes and property covered by deeds of trust securing the same. It was expecting too much within the four days given, to examine all these matters, and it certainly can not be claimed that a prudent person would have sold similar securities on such short notice, owned absolutely by himself.

§ 636. **A general partner in a firm holding property in pledge is incapacitated from purchasing** at a sale made by the firm equally with the firm itself, because such a partner is one of the persons who have a duty to perform in the conduct of the sale which is inconsistent with the character of a purchaser. But a special partner is not incapacitated by his relations with the firm from becoming a purchaser; for he has no share in the management of the affairs of the firm, and is therefore not one of the persons charged with the duty of selling the property at the best price that can be reasonably obtained.[1]

§ 637. **A pledgee who purchases the pledge at a public sale is not chargeable with a conversion of it.** Such a sale is ineffectual to change the title to the property which remains vested in the pledgor as it was before the sale; but that is the only result.[2] The sale is not void but voidable at the election of the defendant. The debtor is at liberty to ratify the sale, and should he do so it would be valid for all purposes. The ratification would make it lawful and relieve it from any imputation of being tortious as to the debtor. The pledgee's title to the property would thereby become perfect, and the debtor would be entitled to credit upon his debt for the net proceeds of the sale. But if the debtor does not do this, but elects to treat the purchase by the pledgee as illegal, the sale thereupon is void, and the parties are remitted to their rights as they

[1] Lewis v. Graham, 4 Abb. Pr. (N. Y.) 106.

[2] Bryan v. Baldwin, 7 Lans. (N. Y.) 174, affirmed, 52 N. Y. 232; Canfield v. Minneapolis Agricultural & Mechanical Asso., 14 Fed. Rep. 801; Minneapolis Asso. v. Canfield, 121 U. S. 295, 7 S. C. Rep. 887, modifying decree; Leighton v. Burkham, 7 Ohio C. C. 487; Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 600, 42 N. E. Rep. 995.

existed before any sale was made or attempted. The debtor is liable upon his debt, and the creditor still holds the property in pledge.[1] The right to avoid such a sale, as against a subsequent purchaser for value, is lost if it is not exercised within a reasonable time.[2]

In a suit by a pledgor to recover from the pledgee damages caused by a wrongful sale of the property pledged, the doctrine that a pledgor can avoid a sale of the pledge for the reason that the pledgee was directly or indirectly the purchaser at such sale, only by exercising the right to avoid it within a reasonable time, has no application. This doctrine applies to cases in which the pledgor, seeks to avoid such a sale and assert title to the property in the hands of a third person who was a purchaser for value, without notice or knowledge of any defect in the exercise by the pledgee of his power of sale.[3]

§ 637a. **The reasons for this rule against purchases by the pledgee are clearly stated by Mr. Justice Williams,** delivering the opinion of the supreme court of Ohio, in a recent case. "The rule results from the nature of the contract between the parties. Under a contract of pledge, the right of the pledgee to retain possession of the property continues until the debt or engagement for the security of which it was pledged has been discharged by payment or performance, or a tender, and demand for its return; and his obligation is to keep the article pledged, with due care, and restore it to the pledgor upon the performance of his agreement. On the other hand, in the absence of any stipulation to the contrary, it is the duty of the debtor to seek the creditor at the proper place and pay the debt, or tender its payment, before he is entitled to receive back the pledge. These obligations of the parties are recipro-

[1] Per Grover, J., in Bryan v. Baldwin, 52 N. Y. 232, affirming 7 Lans. 174.

[2] Learned v. Foster, 117 Mass. 365; Lord v. Hartford, 175 Mass. 320, 56 N. E. Rep. 609; Hayward v. National Bank, 96 U. S. 611.

[3] Lord v. Hartford, 175 Mass. 320, 56 N. E. Rep. 609; Silva v. Turner, 166 Mass. 407, 44 N. E. Rep. 532; Rogers v. Barnes, 169 Mass. 179, 183, 47 N. E. Rep. 602.

cal, and neither can require performance by the other without himself being able and ready to perform on his part; so that, the possession of the pledgee being lawful as long as he retains the actual control and custody of the pledge, with the ability to perform his obligation by restoring it, he is not in default, until a demand, accompanied by a tender of the debt is made. If he then refuse or fail to restore the pledge, he may be charged with its value. The action for its recovery, though treated as one for conversion, is in reality founded on the breach of the contract, and hence, the creditor is entitled to recoup his debt. Until the breach occurs, no right of action accrues in favor of the pledgor; suffering the debt to run unsatisfied after maturity, does not destroy the pledgee's lien, or the pledgor's right to redeem.'"[1]

§ 637b. **But as against a pledgee who purchased the property pledged, a considerable delay in redeeming the pledge** will be regarded as an affirmance of the sale, the pledgor having knowledge of the purchase by the pledgee. The cases generally hold that the pledgor must disaffirm the sale by a tender within a reasonable time after he has knowledge that the pledgee himself was the purchaser.[2]

What is such a reasonable time may depend somewhat upon the circumstances of the case. Where the property pledged was shares of stock, a delay of two months by the pledgor after being informed of the purchase of the stock by the pledgee, and until the stock had risen to a very high price was held to warrant an instruction to the jury as a matter of law that the delay was unreasonable.[3]

[1] Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 600, 42 N. E. Rep. 995; citing Whelan v. Kinsley, 26 Ohio St. 131; Jones on Pledges, §§ 543, 566, 571.

[2] Hyams v. Bamberger, 10 Utah 3, 36 Pac. Rep. 202; Sharpe v. National Bank, 87 Ala. 644, 7 So. Rep. 106; Greer v. Lafayette County Bank, 128 Mo. 559, 30 S. W. Rep. 319; Bryan v. Baldwin, 52 N. Y. 232, 7 Lans. 174; Hamilton v. Schaack, 16 N. Y. Weekly Dig. 423; First Nat. Bank v. Rush, 85 Fed. Rep. 539, 29 C. C. App. 333; Downer v. Whittier, 144 Mass. 448, 11 N. E. Rep. 585; McDowell v. Chicago Steel Works, 124 Ill. 491, 16 N. E. Rep. 854.

[3] Hill v. Finigan, 77 Cal. 267, 19 Pac. Rep. 494.

Where the purchaser at a sale of stock never paid for it, and soon after transferred it to the pledgee, but both the pledgee and the purchaser testified that there was no previous understanding between them as to making such transfer, it was held that after a lapse of four years the pledgor should not be allowed to redeem.[1]

Though a pledgor who accepts the benefits of an irregular sale presumptively ratifies it, yet if he acted in ignorance of the fact that the pledgee himself was the purchaser, he may within a reasonable time after discovering such fact, disaffirm it.[2]

§ 638. **The pledgor may, however, elect to treat such sale as valid;**[3] and such election would be inferred from his acceptance, with full knowledge of the facts, of the proceeds of such sale, to be applied as a credit on the indebtedness for which the pledge was made. The sale is also valid when the pledgee has purchased with the consent of the pledgor; and such assent may be presumed where the facts are notorious and no dissent is shown.[4] A promise by the pledgor made after the sale with full knowledge of the facts to pay a deficiency due to the pledgee is also a waiver of any irregularity in the sale.[5]

Even under a statute which provides that "a pledgee or pledge-holder can not purchase the property pledged, except by direct dealing with the pledgor,"[6] it is held that a sale made by a pledgee in contravention of the statute may be ratified by the pledgor.[7] "The section was undoubtedly enacted for the protection of the pledgor—to the end that no unfair advantage be taken of him. It prohibits a pledgee or pledge-holder from purchasing the property pledged, 'except by direct dealing

[1] Earle v. Grant, 14 R. I. 228.

[2] Sharpe v. National Bank, 87 Ala. 644, 7 So. Rep. 106; Hill v. Finigan, 77 Cal. 267, 19 Pac. Rep. 494.

[3] Stokes v. Frazier, 72 Ill. 428, per Walker, C. J.; Chouteau v. Allen, 70 Mo. 290, 335; per Sherwood, C. J.; Appleton v. Turnbull, 84 Me. 72, 24 Atl. Rep. 592. See, however, Fitzgerald v. Blocher, 32 Ark. 742, 29 Am. Rep. 3.

[4] Carroll v. Mullanphy Sav. Bank, 8 Mo. App. 249; Hamilton v. State Bank, 22 Iowa 306.

[5] Child v. Hugg, 41 Cal. 512, 519.

[6] California Civ. Code, § 3010.

[7] Child v. Hugg, 41 Cal. 512, 519.

with the pledgor.' By such dealing with the pledgor, the pledgee may purchase it. Why should it be held that by this is meant that the pledgee or pledge-holder can only purchase by taking a direct transfer from the pledgor? The statute does not say so, and the reason of the prohibition suggests the contrary. If the pledgor chooses to do so, we see no reason why he may not consent that the pledgee may buy at the public sale. In some cases it may be to his interest that this be done. Such consent may be given either at the making of the pledge or at any subsequent time without changing 'the form of the original contract,' and without consideration.'"[1]

§ 639. **A pledgee who has purchased the collateral is not estopped to show that the sale was made for the purpose of valuing the security** by agreement between the pledgee and a person liable upon another debt secured by the same collateral. Thus, a pledgee in an action upon the principal debt which the pledgor claims has been paid by a sale of bonds held as collateral, may show by parol evidence that the bonds were also held as collateral for other debts, and that a party liable upon another debt so secured became bankrupt, and that the plaintiff made an arrangement with the assignee in bankruptcy of such party, by which the bonds were sold at public auction, the creditor agreeing to bid a certain sum for them, and to prove the balance of the claim against the bankrupt's estate; that there being no higher bid the pledgee kept the bonds and proved the remainder of the claim. The pledgee may show the real nature of the transaction, and that the sale was merely for the purpose of agreeing with the assignee upon the value of the bonds, so that proof could be made against the bankrupt's estate; that in short there was no actual sale, and that the bonds never left the hands of the pledgee.[2]

§ 639a. **The purchaser of the property pledged at a sale by the pledgee pursuant to the terms of the pledge acquires the**

[1] Hill v. Finigan, 77 Cal. 267, 19 Pac. Rep. 494, 10 Pacific Coast L. J. 576, 578.

[2] Globe National Bank v. Ingalls, 126 Mass. 209.

entire interest, so that the pledgor is not entitled, as against the purchaser, to a surplus realized by him in disposing of the property for a sum greater than the amount for which the pledge was made. The pledgor can only recover a surplus of the pledgee, and can recover of him only when he has received a sum in excess of the debt secured by the pledge.[1]

VI. *Sales under Proceedings in Equity.*

§ 640. **The earliest common law rule** in regard to a sale of the property upon default was that before the pledge could be sold, the pledgee was required to bring a suit in equity and obtain authority to sell by judicial proceeding.[2] Such was the rule of the civil law;[3] and such also is the rule under the Civil Code of Louisiana, where even a power to the pledgee to sell the object pledged is a nullity even as between the parties. There can be no sale except by virtue of a judicial order.[4]

A pledgee may properly enforce his lien by a bill in equity, especially when the contract of pledge neither provides for the time of redemption nor the manner and time of sale, and his rights and powers are in any manner questioned or denied.[5] This remedy is more complete than the common law right to sell the pledge, after notice. The pledgee thereby relieves himself from ulterior questions as to the propriety of his course, and the court can act with due regard for the rights of all parties concerned.[6] In equity, while the security is enforced

[1] McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. Rep. 217, 31 C. C. A. 487.

[2] 2 Kent's Com. 582; 2 Story's Eq., § 1008; Ogden v. Lathrop, 1 Sweeny (N. Y.) 643, per Fithian, J.

[3] Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62, 100, per Chancellor Kent.

[4] R. Civ. Code, 1870, art. 3165; Brother v. Saul, 11 La. Ann. 223.

[5] Boynton v. Payrow, 67 Me. 587; Briggs v. Oliver, 68 N. Y. 336, 339, per Andrews, J.; Vaupell v. Woodward, 2 Sandf. Ch. (N. Y.) 143; Sitgreaves v. Farmers' & Mechanics' Bank, 49 Pa. St. 359; Cushman v. Hayes, 46 Ill. 145; Stokes v. Frazier, 72 Ill. 428; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497; Arendale v. Morgan, 5 Sneed (Tenn.) 703.

In *Iowa* it is provided by statute that there may be a foreclosure in equity. See § 620a.

In *Montana* foreclosure may be by judicial sale. 1 Codes 1895, Civ. Code, § 3915.

[6] Porter v. Frazer, 6 Misc. (N. Y.) 553, 560, 57 N. Y. St. Rep. 516, 27 N. Y. Supp. 517.

in behalf of the creditor, others who are interested in it are fully protected.[1]

It may become necessary or desirable to proceed in equity to enforce a pledge, for the reason that the pledgor can not be found so that a personal demand can be made upon him for payment, or so that a personal notice of the time and place of sale of the pledge can be served upon him.[2]

§ 641. **There is jurisdiction in equity to enforce a pledge in case an account must be stated.** Even where jurisdiction in equity is limited to cases where at law there is no full, complete, and adequate remedy, a court of equity has jurisdiction to enforce a pledge of stock given as security for claims and liabilities then existing or afterwards to be incurred, when these claims and liabilities are alleged to consist of a large number of items of money loaned, notes discounted and indorsements made for accommodation.[3] Such a case gives rise to a matter of account; and account is a matter of equity jurisdiction. There is also jurisdiction in equity where there is a fiduciary relation between the parties in the nature of a trust, trust being a matter of equity jurisdiction.[4]

But if the amount due rests in simple computation, and there are no other liens or incumbrances, there is no necessity for resort to a court of equity, as the remedy by notice and sale of the property is adequate; and a court of equity would probably withhold its aid in such case.[5] Where there is a pledge for a definite and ascertained sum there is no occasion for an account before the sale; and the mere fact that after the sale there may be some possibility of questions of account aris-

[1] Homer v. Savings Bank of New Haven, 7 Conn. 478; Halle v. National Park Bank, 140 Ill. 413, 29 N. E. Rep. 727.

[2] Indiana & Ill. Cent. R. Co. v. McKernan, 24 Ind. 62; Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. Dec. 248.

[3] Conyngham's Appeal, 57 Pa. St. 474; Durant v. Einstein, 5 Robt. (N. Y.) 423.

[4] San Pedro Lumber Co. v. Reynolds, 111 Cal. 588, 596, 44 Pac. Rep. 309; Thornton v. Thornton, 31 Gratt. (Va.) 212; Taylor v. Tompkins, 2 Heisk. (Tenn.) 89; Evans v. Goodwin, 132 Pa. St. 136, 19 Atl. Rep. 49.

[5] Dupuy v. Gibson, 36 Ill. 197.

ing, such as to require the aid of a court to adjust, does not give a court of equity jurisdiction to decree a sale.[1]

§ 642. **A pledge of shares of a land association was foreclosed by a decree of sale** in a case arising in Massachusetts where the jurisdiction in equity was at the time of limited extent. Equitable relief was also required in this case, because the certificates provided that a pledge of the shares might be made by the general owner, by an assignment in writing approved by the trustees and recorded in the books, and the shares in pledge still stood in the name of the general owner on the books of the trustees, and could be transferred only by them; and such a transfer, or some instrument of conveyance, was necessary to give the pledgee a clear title to the shares. The deed of trust, moreover, provided that all transfers should be subject to the approval of the trustees, although the owner might sell to an assignee not approved by the trustees, if they should not within a limited time offer to take the stock at the price offered, for the common benefit of the association. The court declared that there was nothing in the facts of the case to prevent the application of the general rule that the pledgee may sell the property after default; that the entire right of the pledgor in the certificate was pledged, and that the ordinary right of foreclosure implied in a pledge of stock or personal property was included. It was further declared that the transfer to be made under the decree of sale, whether it be to the pledgee himself or to a purchaser, must be with the approval of the trustees, or after refusal by them to purchase, as provided in the declaration of trust; that if the certificate be sold, it should be subject to that condition, and if transferred to the pledgee, after the amount at which it should be taken is ascertained, the trustee should have an opportunity to take it at that sum.[2]

[1] Thames Iron Works Co. v. Patent Derrick Co., 1 Johns. & Hem. 93, 99, per Wood, V. C.

[2] Merchants' Nat. Bank v. Thompson, 133 Mass. 482.

§ 643. **In case of a pledge of a title deed,** it seems that there can be no valid sale except under a decree of a court of equity; for such a pledge is really an equitable mortgage, and the remedy for a default is in equity. A sale of the deed, which is really all that the pledgee can effect by his own act, is an imperfect remedy, for it does not give the purchaser possession of the land; and moreover the title may thus be separated from the possession, and great damage may result from a sacrifice of the property at an inadequate price. In a case where a lease was pledged to a solicitor by his client, the latter becoming bankrupt, the former sold the lease. In a suit against him by the bankrupt's assignees, it was held that they were entitled to recover the full amount the solicitor received for the lease, without deducting the amount of the claim secured.[1] Chief Justice Tindal, delivering judgment, said: "Now that lease at the time of such sale was in the possession of the defendant, as a pledge or security for the payment of his demand against the bankrupt, being either in his possession as solicitor, under a claim upon it for his lien, which the law gives him, or having been expressly deposited with him as a security for his demand. In either case the right and power of the defendant over the lease was precisely the same; he had a right to retain the lease in his possession until his demand was paid, and so far by means of the possession of the lease to enforce payment of his demand, but he had that right only; he had no right to sell the lease and to pay himself his demand out of the proceeds. So long as the lease remained in his possession, neither the bankrupt nor his assignee could retake it without either payment of the demand, or a tender and refusal, which is equivalent to payment. But if instead of keeping the thing pledged he sells it or enables any other person to sell it, by concurring in the sale, he is guilty of a direct conversion and makes himself liable for the value of the lease in an action of trover."

§ 644. **A factor may enforce his lien by an equitable suit.** He is generally regarded as invested with the rights of a

[1] Clark v. Gilbert, 2 Bing. N. C. 343, 356.

pledgee.[1] In such suit the factor may enforce his lien, not merely for his commissions and advances upon particular goods consigned, but for the general balance of his account; and he is entitled therein to judgment for any deficiency that may exist after the sale of the consigned goods.[2]

§ 645. **A provision for a summary sale of collateral security upon default does not exclude a sale under judicial proceedings.** Thus, a stipulation in a pledge of railroad bonds that in case of default the pledgee shall have the right to sell them, at public auction, in the city of Chicago, upon giving a specified notice, simply confers a right of sale in a prescribed manner, without expressly or impliedly excluding other lawful proceedings for the attainment of the same object. Neither does such a provision bind the pledgee to sell the bonds in the city of Chicago; but he may commence proceedings in equity to enforce the security in any state whose courts have jurisdiction of the parties, and the bonds may be sold wherever the decree shall provide.[3]

§ 646. **A foreclosure and sale of a pledge may be decreed on the debtor's default in payment of interest,** when interest is in terms or by necessary implication a part of the debt secured. Thus, where stock in a corporation has been pledged for the "redemption of certificates of debt," and these certificates bind the debtor for the payment of "the sum therein mentioned and the interest thereon," the stock is bound for the payment of the interest itself, and a foreclosure may be decreed on default in payment of any installment of interest.[4]

In an action to foreclose a mortgage of real property to secure a debt for which shares of stock in a water company were also pledged to a trustee, the shares of stock can not properly

[1] Edw. on Bailm., 213, 220.

[2] Whitman v. Horton, 46 N. Y. Superior Ct. 531.

[3] Coffin v. Chicago Northern Pacific Construction Co., 67 Barb. (N. Y.) 337, 4 Hun 625. The same rule applies as regards powers of sale in mortgages. Jones on Mortgages, § 1773; Jones on Chattel Mortgages, § 778.

[4] Swasey v. North Carolina R. Co., 1 Hughes 17.

be ordered to be sold under a judgment of foreclosure entered upon default in case such sale is not specifically prayed for in the complaint.[1] A sale of the shares on a void judgment for a deficiency in the foreclosure suit confers no title upon the purchaser, and the pledgor may redeem by tendering the residue of the mortgage debt.[2]

In an action to foreclose a mortgage and a pledge of stock securing the same debt, the judgment should provide not only for a foreclosure of the mortgage, but also for a foreclosure of the pledge.[3]

§ 646a. **If a receiver of the property of a corporation or partnership which has made a pledge has been appointed,** the pledgee, in an action to foreclose his pledge, must make the receiver a party to the action in order to have a valid decree.[4]

In a suit in equity to dissolve a partnership, and for the appointment of a receiver, a creditor of the firm holding collateral security for his debt, consisting of a promissory note containing a power of sale, may intervene by a petition, asking that the security may be sold and the proceeds applied to the payment of his debt, and that he may be admitted to prove his claim for the residue, and an order for the sale of the security is within the authority of the court.[5]

§ 646b. **A pledge to secure an award may be foreclosed in an action in the nature of a proceeding** *in rem*. When a party to a submission agreement for arbitration, in which he has covenanted to pay the award, revokes the submission and so prevents an award, this is itself a breach of the covenant; and if, under the terms of the agreement, a pledge has been deposited for him to secure payment of the award, the condition of the pledge is broken by his rendering its performance impossible,

[1] Security Loan & Trust Co. v. Boston & South Riverside Fruit Co., 126 Cal. 418, 58 Pac. Rep. 941.

[2] Latta v. Tutton, 122 Cal. 279, 54 Pac. Rep. 844.

[3] First Nat. Bank v. Dusy, 110 Cal. 69, 42 Pac. Rep. 476.

[4] Denny v. Cole (Wash.), 61 Pac. Rep. 38.

[5] White v. White, 169 Mass. 52, 47 N. E. Rep. 499.

and the pledge may be foreclosed to the extent of the damages allowed by the statute on revocation of a submission.[1] "The pledge secured the award, and the party revoking the submission prevented an award, and thereby forfeited the pledge and made it, under the statute, liable for the expenses incurred in trying to get an award the same as it would have been liable for an award if made. Non-payment of an award would have violated the condition of the pledge no more than a revocation of the submission violated it, and the pledge is liable for all the direct and natural consequences of such violation except as limited by the statute."

§ 646c. **Upon the insolvency of a corporation a creditor who holds as collateral security some of its bonds secured by mortgage must enforce his security by a bill in equity** to compel a sale under the mortgage and the payment of a due proportion of the proceeds to him. The creditor in such case has no such title under the mortgage that a court of insolvency can order it to be sold. Other holders of the bonds are interested, and the rights of the parties must be enforced through the broader jurisdiction of a court of equity. The decree of sale in such case should provide that the sale be made in accordance with the terms of a power of sale contained in the mortgage.[2]

§ 647. **There can be no decree of strict foreclosure of a pledge.**[3] The doctrine that an equitable mortgagee of title deeds is entitled to foreclosure does not apply. "The principle upon which the court acts in the latter case is, that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the court has interfered to prevent that from having its full effect, and when the ground of interference is gone, by the non-payment of the debt, the court simply re-

[1] Union Ins. Co. v. Central T. Co., 157 N. Y. 633, 52 N. E. Rep. 671, affirming 87 Hun 140, 32 N. Y. Supp. 838, 33 N. Y. Supp. 1135.

[2] Merchants' Nat. Bank v. Greene, 150 Mass. 317, 23 N. E. Rep. 103. And see Franklin County Nat. Bank v. First Nat. Bank, 138 Mass. 515; White v. White, 169 Mass. 52, 47 N. E. Rep. 499.

[3] Carter v. Wake, 4 Ch. D. 605.

moves the stop it has itself put on. Then, when there is a deposit of title deeds, the court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. None of this reasoning applies to a pledge of chattels; the pledgee never had the absolute ownership at law, and his equitable rights can not exceed his legal title.'"[1]

§ 648. **The court may authorize the pledgee to bid when a pledge is sold under decree in equity, in which case he is not allowed to conduct the sale.**[2]

VII. *Surplus Proceeds of Sale.*

§ 649. **Whenever the purpose of the pledge is satisfied the pledgor's right to the surplus becomes absolute.**[3] Thus, where a life insurance policy was pledged, and, after the death of the insured, the insurance company settled with the pledgee and agreed to pay the surplus to the person lawfully entitled to it, it was held the executor of the insured had a purely legal claim for the surplus, and that the company was liable to pay it in full without deduction for expenses incurred by the company in resisting unfounded claims upon it sought to be established by creditors of the deceased through a garnishment process.[4] If the pledgor has assigned his interest in the pledge before the sale, the pledgee should pay the surplus to such assignee.[5]

A creditor collecting or enforcing collateral security, such as negotiable paper, a policy of insurance or a chose in action of any kind, is accountable to his debtor for any surplus above the amount of the debt secured; and the debtor may maintain

[1] Carter v. Wake, 4 Ch. D. 605, per Jessell, M. R.

[2] Carter v. Wake, 4 Ch. D. 605.

[3] Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. Rep. 203; Earle v. New York Life Ins. Co., 7 Daly (N. Y.) 303; Selden v. Vermilya, 3 N. Y. 525; Jones on Chattel Mortgages, § 712; Jones on Mortgages, §§ 1927-1940.

[4] Earle v. New York Life Ins. Co., 7 Daly (N. Y.) 303.

[5] Foster v. Berg, 104 Pa. St. 324.

a bill in equity for an accounting and to recover a balance of the proceeds above the debt and expenses.[1]

§ 650. **The pledgor may collect the surplus due him by suit at law.** But trover will not lie for surplus proceeds of a sale made in pursuance of the terms of sale agreed upon by the parties.[2] Assumpsit is the proper form of action.[3] An action for money had and received will not lie by a pledgor against his pledgee, until a demand has been made upon the pledgee for the surplus proceeds, under an agreement that the latter shall collect the collateral security as it becomes due and apply the proceeds to the payment of the debt.

[1] Tateum v. Rose, 150 Mass. 440, 29 N. E. Rep. 230.

[2] Loomis v. Stave, 72 Ill. 623; Taylor v. Turner, 87 Ill. 296.

[3] Jones on Mortgages, § 1940; Stephens v. Hartley, 2 Mont. 504; Sharp v. Rose, 49 N. Y. St. Rep. 420, 20 N. Y. Supp. 826; Roberts v. Ely, 113 N. Y. 128, 131, 20 N. E. Rep. 606, 22 N. Y. St. Rep. 185, 187.

In the Montana case it was said that, "when goods have been intrusted to an agent or factor to sell, no action will lie against him for the proceeds until demand. With stronger reason, the doctrine applies where property has been intrusted to a pledgee, with power to sell and apply the proceeds to the payment of debts."

CHAPTER XVII.

REMEDIES UPON PLEDGES OF NEGOTIABLE PAPER.

I. *Collateral Paper Can Not be Enforced by Sale Except by Special Power.*

§ 651. **Collateral negotiable paper and other choses in action can not be enforced by sale.** A pledgee of commercial paper as collateral security can not, in the absence of a special authority for that purpose, sell it upon the non-payment of the debt, upon notice to the pledgor, either at public auction or private sale; but he is bound to hold and collect the same when it falls due, and apply the money to the payment of the debt secured.[1] The reason for this exception to the general

[1] Fletcher v. Dickinson, 7 Allen (Mass.) 23; Morris Canal & Banking Co. v. Lewis, 12 N. J. Eq. 323; Garlick v. James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294; Nelson v. Wellington, 5 Bosw. (N. Y.) 178; *Re* Litchfield Bank, 28 Conn. 575; Joliet Iron & Steel Co. v. Scioto Fire Brick Co., 82 Ill. 548, 25 Am. Rep. 341; White v. Phelps, 14 Minn. 27; Union Trust Co. v. Rigdon, 93 Ill. 458, 9 Cent. L. J. 486; Zimpleman v. Veeder, 98 Ill. 613; Cole v. Dalziel, 13 Ill. App. 23; Cleghorn v. Minnesota Title Ins. & Trust Co., 57 Minn. 341, 59 N. W. Rep. 320; Roberts v. Thompson, 14 Ohio St. 1; Gay v. Moss, 34 Cal. 125; Hazzard v. Duke, 64 Ind. 220; Boswell v. Thigpen, 75 Miss. 308, 22 So. Rep. 823; McLemore v. Hawkins, 46 Miss. 715; Handy v. Sibley, 46 Ohio St. 9, 17 N. E. Rep. 329; Stevens v. Wiley, 165 Mass. 402, 43 N. E. Rep. 177; Hallack Lumber & Manuf. Co. v. Gray, 19 Colo. 149, 34 Pac. Rep. 1000; Whitteker v. Charleston Gas Co., 16 W. Va. 717.

rule in relation to the sale of property pledged is, that such paper has no established market value, and it can not be presumed it was the intention of the parties thus to deal with it.

A usage among the bankers of New York to dispose of notes held as collateral, by making sale of them, was held by the court of appeals of New York to be void, because it was in opposition to this rule of law.[1] The ground of the decision is, that notes, not being usually marketable at their fair value, must generally be sold at a sacrifice, and so injustice would be likely to be done to the debtor, even if the sale were at public auction and with notice.

A special power to sell negotiable paper taken as collateral security upon default in payment of the debt is not exclusive of every other means of rendering the security available. The pledgee has the right to receive payment of such collateral paper and to enforce payment of it by action.[2] Such a right is incident to every pledge of negotiable paper. When, therefore, an express power is given the pledgee to sell such paper upon default, the necessary conclusion is that the power of sale is given, not for the purpose of restricting or curtailing the rights of the pledgee, but for the purpose of enlarging his rights and making the pledge more advantageous to him by giving him a more effectual and speedy means of obtaining money from his security.[3]

§ 652. **This rule may be suspended by agreement of the parties**; and such is the effect of a written agreement, that, upon default, the creditor may collect the pledged notes, or may negotiate them for the purpose of liquidating the debt.[4] But the

[1] Wheeler v. Newbould, 16 N. Y. 392, 5 Duer 29; Brown v. Ward, 3 Duer (N. Y.) 660; Atlantic F. & M. Ins. Co. v. Boies, 6 Duer (N. Y.) 583; Moody v. Andrews, 39 Super. Ct. Rep. (N. Y.) 302; affirmed, 64 N. Y. 641; Morris Canal & Banking Co. v. Lewis, 12 N. J. Eq. 323.

[2] Nelson v. Wellington, 5 Bosw. (N. Y.) 178; Brookman v. Metcalf, 5 Bosw. (N. Y.) 429, 445; Whitteker v. Charleston Gas Co., 16 W. Va. 717; First Nat. Bank v. Kimberlands, 16 W. Va. 555; Third Nat. Bank v. Harrison, 3 McCrary 316.

[3] Per Woodruff, J., in Nelson v. Wellington, 5 Bosw. (N. Y.) 178.

[4] Hunter v. Hamilton, 52 Kan. 195, 34 Pac. Rep. 782; Roberts v. Thompson, 14 Ohio St. 1; Fraker v. Reeve,

sale in such case must be made in good faith and for a reasonable price, and must be exercised in the usual manner of a sale of a pledge, and as a trust for the debtor's benefit as well as for the creditor's own benefit.[1] Thus, certain promissory notes were pledged to a trust company as collateral security for a debt of a smaller amount, with authority to sell the same on maturity of the principal debt, "at public or private sale, without advertising the same, or demanding payment, or giving notice." The debt not being paid at maturity, the trust company, without demanding payment of the collateral notes, which had also matured, wrote to the maker of them that these notes would be sold to satisfy the debt, and offering him the first chance to purchase. A few days later the company surrendered the notes to the maker upon his paying the amount of the debt for which they were pledged as security, this amount being much less than the amount of the collateral notes. The question presented was, therefore, whether an arrangement made between the pledgee of past-due negotiable paper and the maker of such paper, whereby he transfers such paper to the maker for less than its face, and for an amount precisely sufficient to pay the principal debt, is a sale within the meaning of the power conferred. It is certain that this could not be done without the aid of the special power; and it is equally certain that such an arrangement was not within the scope of the power given. The supreme court of Illinois,[2] so deciding, say: "The intention of the parties to the contract is the real point of inquiry. When the pledgor authorized the trust company to sell the securities at public or private sale, what was understood and intended by the parties? Was not an ordinary sale and purchase in their minds,—a contract whereby the seller parted with property and title, and the buyer

36 Wis. 85; Brightman v. Reeves, 21 Tex. 70; Goldsmidt v. First Methodist Church, 25 Minn. 202, 6 Rep. 435; Cole v. Dalziel, 13 Ill. App. 23; Cooper v. Simpson, 41 Minn. 46, 42 N. W. Rep. 601.

[1] Union Trust Co. v. Rigdon, 93 Ill. 458, 9 Cent. L. J. 486; Brightman v. Reeves, 21 Tex. 70; Goldsmidt v. First Methodist Church, 25 Minn. 202, 6 Rep. 435; Sparhawk v. Drexel, 12 N. Bank. R. 450.

[2] Union Trust Co. v. Rigdon, 93 Ill. 458, 9 Cent. L. J. 486.

obtained property and the title thereto? Can we suppose they contemplated a transfer whereby the property would be destroyed and the title extinguished? If the pledgor had intended a transaction such as is here involved, would he not have used language such as is used in the books or by the courts, or other apt language, to designate such transaction? Would he not have given authority to compromise or surrender the securities? Is it not a latitudinarian, if not a strained, enforced construction, to call the transaction here a sale? In its ordinary sense and according to the common use of language, as also in the strict and proper acceptation of the word, a sale is not understood as designating a transfer such as this. Again, the power under consideration is in derogation of common-law duties, and wipes out wise and equitable safeguards interposed by that law for the protection of the pledgor, and relieves the pledgee from just duties imposed upon him; and which safeguards and duties are intended to prevent fraud and a breach of the trust imposed." The court furthermore held irrelevant and inadmissible evidence that the trust company made reasonable efforts to sell the notes and failed to find a purchaser, and that the sale and transfer to the maker of the notes was in fact without any collusion or actual fraud, and for the best price that could be obtained for them. An offer to show that the maker of the collateral paper gave other paper to the debtor for no value received, or that he had other claims against the debtor, was also disallowed; inasmuch as this was not an offer to prove that these particular notes were accommodation paper, or that the maker had a legal defense to them. The presumption of law is that the notes were given for a good and valuable consideration, and it is also the presumption that the maker was solvent; and, therefore, the measure of damages in a suit by the debtor against the trust company was the amount due upon the notes, less the amount paid on them.

Where the maker of a promissory note pledged as collateral security for the note certain shares of stock and a life insurance policy, and agreed to maintain on demand ten per cent. margin collateral security during the continuance of the

note, "and on the non-performance of this promise, or any part of it" he authorized the payee to sell the collateral security at any broker's board, or at public or private sale, at his option, it was held that the authority thus given to sell, upon "the non-performance of this promise, or any part of it," applied as well to the non-performance of the promise to pay the note at maturity as to the non-performance of the agreement to keep up the margin when so demanded; and a sale of the stock by the payee on the non-payment of the note was not a conversion to his own use.[1]

§ 653. **A promissory note may be sold by a pledgee under a power of sale** conferred upon him, and such sale made in good faith to one capable of buying, will pass the title to the note beyond the pledgor's reach, although it be sold for less than the sum due upon it.[2] If, however, the maker of the pledged note negotiates with the pledgee for its purchase for the amount due the latter upon the principal debt, which is much less than the face of the pledged note, and the maker is informed of the time of the sale, while the pledgor is not, and the maker purchases the note at a formal public sale, this will not be regarded as such a sale as the law requires, but rather as a compromise between the pledgee and the maker of the note.[3]

But if a promissory note be pledged, with the agreement that if the debt for which the note is pledged be not paid at maturity, the pledgee may make the money out of it in the best way he can, and that he may sell the note for that purpose, he is not authorized to sell it without notice to the debtor to redeem, and of the time and place of sale. A notice after maturity of the debt, that if it is not paid within a specified time, the pledgee will make the best disposition he can of the pledged note, either by public or private sale, is not sufficient.[4]

[1] Manning v. Shriver, 79 Md. 41, 28 Atl. Rep. 899.

[2] Zimpleman v. Veeder, 98 Ill. 613; Laclede Nat. Bank v. Richardson, 156 Mo. 270, 56 S. W. Rep. 1117.

[3] Zimpleman v. Veeder, 98 Ill. 613.

[4] Goldsmidt v. First Methodist Church, 25 Minn. 202, 205. Per Gilfillan, C. J. "It was competent for the parties to agree how the sale should be made; but without any such agreement, and where the power

§ 654. **Yet, contrary to the prevailing rule,** there are authorities which hold that commercial paper pledged as collateral security may, under special circumstances, be sold after its maturity in the same manner that any other pledge may be sold.[1] The supreme court of Rhode Island, deciding to this effect, say:[2] "It may be that, in the absence of any express authority, no authority should be implied to sell the paper before it matures; but must we hold that no authority can be implied to sell the paper after it matures if unpaid, thus obliging the pledgee to involve himself in a lawsuit, and possibly in several lawsuits, if he would be indemnified out of the paper? We think not. The general rule is, that the pledgee of personal property has authority to sell in case the pledgor makes default, and the rule should have no exceptions which are not based on good reasons. It may be a reasonable exception to the rule that the pledgee of commercial paper soon to mature should not sell it immediately upon the pledgor's default, but should wait for it to mature, and then present it for payment. It is not probable that a court of equity, if asked to sanction the sale of such paper, before it matured, for the benefit of the pledgee, would refuse the request; but if the same request were made after the paper had matured, and payment thereof had been refused, we are inclined to think the request would be deemed reasonable, and would be granted. We see no good reason for requiring that the pledgee should be at the expense of a suit in equity to authorize a sale, if a sale is to be had, except it be for the protection of the pledgor; and the pledgor, if duly notified, can protect himself, provided the sale is made in a proper place and at public auction."

to sell is merely given, the power will be construed to be such a power as exists in respect to pledges generally, and must be exercised in the same way. In respect to pledges generally, the power can be exercised only upon reasonable notice to the debtor to redeem, and of the time and place of sale."

[1] Davis v. Funk, 39 Pa. St. 243, 80 Am. Dec. 519; Richards v. Davis, 5 Clark (Pa. Law J. Rep.) 471; Brightman v. Reeves, 21 Tex. 70; Hunter v. Hamilton, 52 Kan. 195, 34 Pac. Rep. 782.

[2] Potter v. Thompson, 10 R. I. 1, 8.

§ 655. **Sale under decree in equity.**—While the pledgee himself can not, without express authority for this purpose, sell commercial paper pledged as collateral, yet a court of equity may, at least under special circumstances, order a judicial sale of it.[1] But the question of the right of a pledgee to come into court, and have a decree for a judicial sale of the pledge, is an entirely different question. This was always a well-recognized head of equitable jurisdiction, even where the pledgee or mortgagee had a right to sell the property. The sale being under the direction and control of the court, it has the power, as it is its duty, to see to it that the property shall not be sacrificed; and hence, such a sale is not liable to the evils or abuses to which a sale by a party himself is subject. Just when and under what circumstances a court would or should order a sale of commercial paper or other collateral of similar character it is not necessary to consider. The right to do so, at least under special circumstances, is undoubted.[2] In the present case the collateral note had some four years to run before it matured. The pledgor had become insolvent, and had made a general assignment for the benefit of all his creditors. The plaintiff had proved his claim in the insolvency proceedings, and had claimed, as he might, the right to participate in the benefits of the assignment in case the pledged property proved insufficient to satisfy his claim in full. Hence, unless the collateral should be sold, the final settlement of the estate of the insolvent would be postponed for several years. These facts made a proper case, even under the strictest rule, for a judicial sale of the collateral note.'"[3] Under special circumstances, a pledgee of negotiable paper may resort to a court of equity for a sale of the security, and may foreclose the pledge in the same manner and with like effect as if the transaction were a mortgage; and it is rather intimated

[1] Cleghorn v. Minnesota Title Ins. & Trust Co., 57 Minn. 341, 59 N. W. Rep. 320.

[2] Citing Pom. Eq., §§ 164, 1231; Daniels Neg. Inst., § 833; Jones on Pledges, § 655; Donohoe v. Gamble, 38 Cal. 340, 99 Am. Dec. 399.

[3] Cleghorn v. Minn. Title Ins. & T. Co., 57 Minn. 341, 344, 59 N. W. Rep. 320, per Mitchell, J.

that the same rule would apply in case of an ordinary pledge of such paper.[1] The fact that the maker of the paper pledged resides in a remote country, or in a different state, and that it does not appear that he has any property subject to seizure and sale within the jurisdiction of the former, is at any rate sufficient to authorize the holder of the pledge to resort to a court of equity for a foreclosure and sale. It would be a hardship upon the pledgee to be forced to attempt the collection of the paper under such circumstances, and a burden upon him which could not have been within the contemplation of the parties to the contract. The pledgee, instead, being forced to incur the trouble, expense, and hazard of pursuing the maker of the paper pledged through the courts of a foreign country or state, is allowed to go into equity for a foreclosure and sale of the note for whatever it will bring in the market at a judicial sale. The pledgor must necessarily have due notice of the proceeding, and if the security brings an inadequate price at the sale, it is his misfortune, which he might have guarded against by a proper stipulation in the contract.[2]

§ 656. **In Texas** a creditor holding negotiable paper as collateral security, may collect it at maturity, and apply the proceeds to the payment of the debt, even after the death of the debtor; although, in this state, a mortgagee or lien-holder is required to prove his claim against the estate of the deceased, and ask the aid of the probate court to enforce the lien. The probate laws suspend the right of a mortgagee or lien-holder to sell the property by making the lien subordinate to other claims; but these laws do not apply to a creditor who holds negotiable paper of a third person as security, and thus has in his own hands that which may be treated as so much money, and appropriated to the payment of the debt secured.[3] If, however, such paper prove to be uncollectible, and the cred-

[1] Donohoe v. Gamble, 38 Cal. 340, 99 Am. Dec. 399.

[2] Donohoe v. Gamble, 38 Cal. 340, 99 Am. Dec. 399.

[3] Huyler v. Dahoney, 48 Tex. 234; Morphy v. Garrett, 48 Tex. 247.

itor be driven to treat it as mere personal property, pledged to secure a debt, and to invoke the aid of the courts in enforcing his lien by sale, then the matter might come within the reach of the probate laws.[1]

§ 657. **An ordinary mortgage and note, or bond, can not be sold** by the pledgee on default any more than a promissory note alone may be sold; but, of course, such a sale may be made by force of an express agreement by the pledgor,[2] and power to negotiate a note and mortgage, for the purpose of satisfying the principal debt, is held to authorize their sale.[3] If a mortgage be transferred as collateral security for an amount less than its face, and the pledgee refuse to foreclose it after maturity, the pledgor may maintain an action of foreclosure. He has an interest in the mortgage, and is not restricted to the remedy of tender or repayment. The pledgee will be protected in his rights in such foreclosure suit by an order that he shall be first paid out of the fund derived from the sale of the mortgaged property.[4]

A non-negotiable warrant or order upon a town or city is subject to the same rule, and can not be sold by the pledgee, or a court of chancery at his instance. It must be collected.[5]

A non-negotiable order upon a private corporation is also subject to the same rule.[6]

§ 657a. **Where securities having a long time to run, such as government, state, municipal or other corporate bonds, or**

[1] Huyler v. Dahoney, 48 Tex. 234, per Gould, J.; Williams v. Lumpkin, 74 Tex. 601, 12 S. W. Rep. 488.

[2] Fletcher v. Dickinson, 7 Allen (Mass.) 23; Morris Canal & Banking Co. v. Fisher, 9 N. J. Eq. 667, 701, per Elmer, J.

[3] Fraker v. Reeve, 36 Wis. 85.

[4] Burlingame v. Parce, 12 Hun (N. Y.) 149; Wells v. Wells, 53 Vt. 1, 5, per Barnett, J.: "The court would see to it that the rights and interests of the pledgee were protected in reference to the collateral, at the same time that the pledgor was acting in regard to his own existing reversionary interest in the pledge, by the proceeding to enforce it as against the debtor in the pledge." And see Newport & Cincinnati Bridge Co. v. Douglass, 12 Bush (Ky.) 673.

[5] Whitteker v. Charleston Gas Co., 16 W. Va. 717.

[6] First Nat. Bank v. Kimberlands, 16 W. Va. 555.

mortgage bonds, are assigned as collateral to a note running a few months only, it has been held that the pledgee, upon the maturity of the principal debt, may sell the collateral without any express authority for a sale. Thus, where one gave a bond and mortgage having two years and nine months to run as security to a bank for the pledgor's note, payable in three months, it was held that the court should direct a receiver of the bank which made the loan to sell the bond and mortgage, on the ground that an authority to sell may be implied from the transaction itself and the presumed intent of the parties.[1]

§ 658. **But a mortgagee of a note, or of a note and mortgage, may sell the security** upon his debtor's default, because, in case of a mortgage, the title vests absolutely in the mortgagee upon default, and, unless restrained by statute, he may deal with the mortgaged property as his own; he may sell it without formal foreclosure.[2]

If a note and mortgage be assigned as security by an assignment conditional in form, and therefore, in fact, a mortgage, the assignee may sell the note upon default of the assignor in paying the debt secured, without being liable to the assignor as for a conversion of the note.[3] If a pledgee of a mortgage and note secured thereby be authorized in terms to sell the "mortgage," he may sell the note and mortgage. "The mortgage was valuable only as security for the note. A sale of the mortgage separate from the note would amount to nothing. The word 'mortgage' was evidently used in its ordinary and popular sense, and in which it is also often used in conveyancing, as including the debt secured, and not merely the piece of paper technically called a 'mortgage.' There is no room for doubt

[1] Porter v. Frazer, 6 Misc. (N.Y.) 553, 27 N. Y. Supp. 517, 57 N. Y. St. 516; Brown v. Ward, 3 Duer (N. Y.) 660; Duffield v. Miller, 92 Pa. St. 286; Newport & Cincinnati Bridge Co. v. Douglass, 12 Bush (Ky.) 673; Alexandria L. & H. R. Co. v. Burke, 22 Gratt. (Va.) 254; Fletcher v. Dickinson, 7 Allen (Mass.) 23; Washburn v. Pond, 2 Allen (Mass.) 474; Brown v. Tyler, 8 Gray 135, 69 Am. Dec. 239; Whipple v. Blackington, 97 Mass. 476; Hancock v. Franklin Ins. Co., 114 Mass. 155.

[2] Jones on Chattel Mortgages, §§ 699–712; Richards v. Davis, 5 Clark (Pa.) 471.

[3] Fraker v. Reeve, 36 Wis. 85.

as to the meaning of the power of sale. What defendants were authorized to sell was the security.'"[1]

A clause in a pledge of a note and mortgage as collateral security, providing that in case of default the mortgagee might immediately maintain an action to fix the amount due and to obtain a decree directing a sale of the note and mortgage by the sheriff, does not restrict the pledgee to a sale of the note and mortgage, or prevent his foreclosing the mortgage.[2] Neither does a power to sell a collateral note or note and mortgage limit the pledgee to that remedy, but he may enforce the security in the usual manner by suit or foreclosure.[3]

§ 659. **One holding a mortgage as collateral security may foreclose it** upon a breach of the condition, though the principal debt be not due.[4] If the foreclosure be by sale the pledgee holds the proceeds of the sale in place of the mortgage. If the foreclosure be a strict foreclosure, or be by writ of entry, or by entry and possession, the pledgee thereafter holds the land as security in place of the mortgage upon it. The foreclosure does not work a payment of the principal debt. In case the foreclosure has resulted in giving the pledgee the possession and title to the land, the pledgor has the right to redeem the land upon paying the debt for which the pledge was made, so far as this has not been paid by the rents and profits of the land. The pledgee holds the land by title absolute as against the mortgagor, but as security merely as against the pledgee. Accordingly, where a mortgage for four thousand dollars was assigned as collateral for a loan for two thousand dollars, with an agreement that the lender, on receiving payment of the mortgage, would pay to the borrower the excess above the amount of the loan, and there was no agreement about fore-

[1] Watson v. Smith, 60 Minn. 206, 208, 62 N. W. Rep. 265, per Mitchell, J.

[2] McArthur v. Magee, 114 Cal. 126, 45 Pac. Rep. 1068.

[3] Nelson v. Eaton, 26 N. Y. 410; Nelson v. Edwards, 40 Barb. 279; Third Nat. Bank v. Harrison, 10 Fed. Rep. 243.

[4] Jenkins v. International Bank, 111 Ill. 462; Colby v. McOmber, 71 Iowa 469, 32 N. W. Rep. 459.

closure, and subsequently the lender foreclosed the mortgage without making the borrower a party, and himself purchased the premises at the foreclosure sale, for the amount of the principal debt, and afterwards sold the premises for five thousand dollars, it was held that the borrower was entitled to recover of the lender the value of the mortgage, or the amount of its proceeds, less the amount of the principal debt secured. The equitable interest which the borrower retained in the mortgage attached to the land upon the purchase of it by the lender, and the borrower was entitled to the surplus above the loan secured, upon the sale of the land by the lender for more than the amount of his claim.[1]

A corporation executed a mortgage as security for certain bonds, which were intended for sale upon the market. When only a few of the bonds had been sold, the trustee under the mortgage made a loan to defendant for about one-half the amount of the mortgage and took the bonds and mortgage as collateral security. Upon default in the payment of interest, the bonds and mortgage were sold at public auction and purchased by the trustee or mortgagee. It was held that the mortgagee was not a *bona fide* holder, in the sense of being in a position to insist upon the absolute provisions of the mortgage in respect to forfeiture, and while entitled to foreclose the mortgage for the purpose of perfecting and realizing upon his securities, his security could not extend beyond the actual indebtedness, and the foreclosure would be for the benefit of both himself and the bondholders.[2]

§ 659a. **If the pledgee of a mortgage forecloses it and purchases the land for a sum in excess of that due upon his debt, subject to a prior mortgage,** he must account to the mortgagor, or to his assignee in bankruptcy, or assignee for the benefit of creditors, or to his judgment creditors, for the excess of money received above the amount of his debt, notwithstanding he has

[1] Dalton v. Smith, 86 N. Y. 176; Ross v. Barker, 58 Neb. 402, 78 N. W. Rep. 730.

[2] Knickerbocker Trust Co. v. Penacook Mfg. Co., 100 Fed. Rep. 814.

applied such excess towards the payment of the prior mortgage.[1]

A pledgee is precluded from buying at a foreclosure sale under a mortgage pledged as security, whether the sale is held under a statute regulating sales of pledged property, or under the contract of pledge, or otherwise. A pledgee is precluded from buying the property pledged at a foreclosure sale, on the ground that his duty to the pledgor is inconsistent with his interest as a purchaser. His duty to the pledgor is to get the highest price which he can reasonably get for the property pledged, and his interest as a purchaser would be to buy the property as cheaply as he could. This conflict between his duty and his interest is the same whether he sells under the statute or otherwise.[2]

The pledgee of a mortgage can not affect the rights of the mortgagee by accepting a conveyance of the mortgaged premises from the mortgagor, and releasing the mortgage. The consent of the mortgagee is necessary to bind him, and if no such consent is given, he may bring an action to set aside the conveyance and release, and to foreclose the mortgage.[3]

The pledgee of a mortgage is not required to accept the offer of a purchaser of the mortgaged property at a sale under a junior lien to give security on such property. The pledgee is entitled to retain his original security.[4]

§ 659b. **A pledgee of a mortgage may relieve himself of any trust in behalf of the pledgor, so that his purchase at the foreclosure sale will be good,** by giving explicit notice to the pledgor that he would act only for himself, and would not bid up the property for more than enough to protect his claim, and that if the pledgor desired to bid anything above that amount it would be necessary for him to be present at the sale

[1] Hopkins v. Hemm, 159 Ill. 416, 42 N. E. Rep. 848; Ross v. Barker, 58 Neb. 402, 78 N. W. Rep. 730; Kelly v. Matlock, 85 Cal. 122, 24 Pac. Rep. 642; McArthur v. Magee, 114 Cal. 126, 45 Pac. Rep. 1068.

[2] Lord v. Hartford, 175 Mass. 320, 56 N. E. Rep. 609, per Loring, J.

[3] Chester v. Hill, 66 Cal. 480, 6 Pac. Rep. 132.

[4] Hartman Steel Co. v. Hoag, 104 Iowa 269, 73 N. W. Rep. 611.

himself, especially if the foreclosure is made by the pledgor's direction or request and not against the will or in derogation of the interest of the pledgor. Mr. Justice Mitchell of the supreme court of Pennsylvania, rendering a decision of the court to this effect, said: "Had he (the pledgee) bought in the property without further notice to the plaintiff, the presumption might still have been that the purchase was to preserve the pledge for their mutual benefit according to their respective rights, and therefore that the relation of trust still continued, and the sale made, as the learned judge below held that it did, a mere substitution of the land for the mortgage. But appellant did not take this course. He gave explicit notice that he would act only for himself, and would not bid up the property for any more than enough to protect the loan, and that if plaintiff desired to bid anything above that amount it would be necessary for him to be on hand himself. This relieved appellant from any trust in case he purchased, and put him in the position of an ordinary purchaser at a mortgage sale, who takes a clear title, even though he be the mortgagee. This feature clearly distinguishes the present case from Brown v. Tyler,[1] *In re* Gilbert,[2] and the other New York cases cited by appellee. In fact, this case is more closely analogous to Bloomer v. Sturges,[3] in which the mortgagee was made a party defendant to the assignee's bill of foreclosure, and his interest was held to have been distinguished. The principle of all the cases is that the pledgee, being within certain limits a trustee, is therefore presumed to act for the pledgor's interest as well as his own; but their interests are not identical, and where they may require different action the pledgee is entitled to regard his own, after having put the other party on his guard, by notice to him that he must look out for himself. This is what appellant did. When he bought, therefore, he bought for himself and in his own right. He thereby elected to take the property on account of the debt. If he had subsequently sold it at a loss he could not have called upon the plaintiff to

[1] 8 Gray 135, 69 Am. Dec. 239.
[2] 104 N. Y. 200, 10 N. E. Rep. 148.
[3] 58 N. Y. 168.

make good the deficiency, for there was evidence that the latter had distinctly refused to preserve his interest by any separate bid of his own at the sale. On the other hand, appellant having taken the risk was entitled to the profit on the resale. The burden of showing the circumstances that entitled him to buy, clear of any trust for the pledgor, being on the appellant, the case must go to the jury on that point."[1]

§ 660. **A pledgee's interest by foreclosure of the mortgage becomes a mortgagee's interest.** The pledgee becomes a mortgagee. The land in his hands is affected by a trust, to convert it into money, and pay over any balance of the proceeds remaining after payment of the debt due from his debtor to him, or, upon the debtor's payment of the debt, to release and quitclaim the land to him.[2] But in such case, the debtor must bring his bill to redeem within twenty years from the time that possession was obtained, no interest having been paid meanwhile; this being the period which equity has adopted, beyond which a mortgagor will not be admitted to redeem without special cause.[3]

If a pledgee holding a mortgage as collateral security forecloses it by a suit in equity, to which he makes the pledgor a party, and the latter takes no appeal, and claims no defense, he will not afterwards be allowed any relief as regards the mortgage or the mortgage note, on the ground that he had suffered loss through the negligence of the pledgee in not sooner enforcing the security.[4]

§ 661. **A pledge of any chose in action other than stocks and bonds should be enforced by collection,** rather than by sale. Thus, a pledge of a contract for building a road should be enforced by collecting the amount due upon the contract.[5]

[1] Plucker v. Teller, 174 Pa. St. 529, 534, 34 Atl. Rep. 208.

[2] Stevens v. Dedham Inst. for Savings, 129 Mass. 547, per Soule, J.; Brown v. Tyler, 8 Gray (Mass.) 135, 69 Am. Dec. 239; Montague v. Boston & Albany R. Co., 124 Mass. 242; Ross v. Barker, 58 Neb. 402, 78 N. W. Rep. 730; Maxwell v. Home F. Ins Co., 57 Neb. 207, 77 N. W. Rep. 681.

[3] Jones on Mortgages, § 1144.

[4] Wells v. Wells, 53 Vt. 1.

[5] Gay v. Moss, 34 Cal. 125.

§ 662. **A pledge of a savings-bank book,** and of the deposit represented by it, would not ordinarily be sold under proceedings in equity; but the court, after the failure of the administrator to pay the debt, with interest and costs, within a time designated, would appoint an officer to receive the deposit, and make proper disposition of it.[1] And so a pledgee of any chose in action, such as a contract for the payment of a sum of money, is ordinarily bound to collect the amount due and reimburse himself out of the proceeds.[2]

§ 663. **A creditor may pursue his remedies simultaneously or successively** upon the principal debt and upon the collateral obligation. If the collateral note be secured by mortgage, the creditor may have his remedy upon this, also, at the same time with the personal remedies. And in like manner he may proceed to enforce any other collateral security or lien. Thus, a mechanic or contractor, having a lien under the mechanic's lien law, and also a collateral note of a third person, to secure him for work done, may simultaneously enforce the principal debt, the collateral note, and the statutory lien by legal proceedings and suits adapted to the respective remedies, and may recover separate judgments in each; but there can be but one satisfaction.[3]

A creditor holding collateral security may enforce it by suit, although he has a suit pending against the principal debtor, who claims that the debt has been paid. The collateral security is put into the hands of the creditor, to enable him to make his claim out of it.[4] If, before he has done so, the principal debtor discharges the debt, then the collateral must be surrendered, or any suit pending upon it must be placed within the control of the debtor. Nothing short of satisfaction

[1] Boynton v. Payrow, 67 Me. 587.

[2] Gay v. Moss, 34 Cal. 125.

[3] Gambling v. Haight, 59 N. Y. 354; and see Jervis v. Smith, 1 Sheldon (N. Y.) 189, 195; Plant's Manufacturing Co. v. Falvey, 20 Wis. 200.

[4] Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120; Olvey v. Jackson, 106 Ind. 286, 4 N. E. Rep. 149. Unless there be an agreement to use every legal means to collect the debt before resorting to the collateral. Barr v. Kane, 32 Ind. 416.

of the original debt will prevent a recovery by the creditor upon the collateral;[1] and even after such satisfaction, if this occur after the commencement of suit upon the collateral, the pledgor may continue the suit and obtain judgment for his own benefit. But after the principal debt has been satisfied, the pledgee can not continue the suit against the maker of the collateral note against the will of the pledgor, or after the maker of the collateral note has paid it to the pledgor; though the pledgee would be entitled to be paid the costs of suit commenced upon the collateral note.[2]

If one makes two promissory notes amounting to nine hundred dollars, and a third note to the same payee of the same date and payable at the same time as the other notes, but containing a statement that the maker had deposited therewith as collateral security certain shares of stock with authority to the payee to sell the stock on the non-payment of the note, the payee may maintain an action on the first two notes and at the same time an action on the third note, and may take judgment in both actions for the full amounts of the notes, though there can be but one satisfaction of the debt of nine hundred dollars and interest.[3]

II. *Suit upon Collateral Paper.*

§ 664. **No demand upon the pledgor is necessary before bringing suit to collect negotiable paper pledged as collateral security,** when the debt to secure which the pledge was given is payable at a time certain.[4] If the payee of a promissory note deliver it before maturity to a creditor as collateral security, in such a form that the pledgee has the legal title to it,—as where it is a note payable to bearer, or if payable to order is regularly indorsed,—the creditor may, upon its ma-

[1] Lazier v. Nevin, 3 W. Va. 622; Smith v. Strout, 63 Me. 205.

[2] Key v. Fielding, 32 Ark. 56.

[3] Burnham v. Windram, 164 Mass. 313, 41 N. E. Rep. 305. And see Savage v. Stevens, 128 Mass. 254; Vanuxem v. Burr, 151 Mass. 386, 24 N. E. Rep. 773.

[4] White v. Phelps, 14 Minn. 27, 100 Am. Dec. 190.

turity, maintain an action against the maker without previously demanding from the pledgor repayment of the loan. The bearer or indorsee of the note is entitled to collect it.[1] It does not matter that the debt for which the note is held as collateral is not due when suit is brought upon the collateral note.[2] Having the legal title, the holder of the collateral note may maintain an action upon it when it becomes due, without averring or showing that the indebtedness secured by the note has not been paid.[3] He is entitled to collect the collateral note when it falls due.[4] So long as the creditor holds the collateral note in pledge he has the right to collect it on its maturity, and the creditor is not precluded from so collecting it by a receipt for the collateral note given to the debtor, whereby the creditor agrees to return the note upon the payment of the debt for which he took it as security, and to use all legal means to collect it if so directed by his debtor. The creditor in such case need not wait for a direction from the debtor to collect.[5] He may collect the full amount of the note or bond pledged, and not merely the amount of the debt secured, subject, however, to the liability to account to the debtor for any surplus.[6] Although the principal debt be paid pending a suit upon the collaterals, such suit may properly be continued to judgment by the creditor or in his name. If he afterwards collects such collaterals he will hold the amount so collected as trustee for the benefit of the debtor.[7]

A bank which has discounted a note for a depositor, receiving as collateral the notes of other persons, may enforce the

[1] Paine v. Furnas, 117 Mass. 290; Lindsay v. Chase, 104 Mass. 253; Nelson v. Edwards, 40 Barb. (N. Y.) 279, 5 Bosw. 178; Moody v. Andrews, 39 N. Y. Super. Ct. 302; Louisiana State Bank v. Gaiennie, 21 La. Ann. 555; Dix v. Tully, 14 La. Ann. 456; Ducasse v McKenna, 28 La. Ann. 419; Third Nat. Bank v. Harrison, 10 Fed. Rep. 243; Hilton v. Waring, 7 Wis. 492.

[2] Jones v. Hawkins, 17 Ind. 550.

[3] McCarty v. Clark, 10 Iowa 588.

[4] Farwell v. Importers' & Traders' Nat. Bank, 47 N. Y. Super. Ct. 409, 90 N. Y. 483; Wheeler v. Newbould, 16 N. Y. 392; Nelson v. Eaton, 26 N. Y. 410; Comstock v. Smith, 23 Me. 202.

[5] Bay v. Gunn, 1 Denio (N. Y.) 108.

[6] Rice v. Southern Penn. Iron & R. Co., 9 Phila. 294; Hilton v. Waring, 7 Wis. 492.

[7] Houser v. Houser, 43 Ga. 415; and see Overstreet v. Nunn, 36 Ala. 666.

latter notes, although the bank has had on deposit moneys belonging to the debtor, and has made no effort to collect the demand from such deposits.[1]

§ 665. **The pledgee may enforce payment of collateral paper upon its maturity,** although the principal debt has not then matured. Yet while he is entitled to collect a collateral note upon its maturity, he has no right to apply the proceeds to the payment of his loan until after default in the payment of that. The money when received is a substitute for the note, and is to be held upon the same terms, and subject to the same rights and duties as the note.[2] If the debt secured is payable at a definite time, no application of the proceeds of a collateral note can be made until that time arrives. If the debt secured is payable upon demand, a demand upon the debtor must be made before applying the proceeds of a collateral note.[3]

A loan upon call was obtained by a broker from a bank upon a pledge of several promissory notes for an amount exceeding the amount of the loan. One of these notes had been delivered to the broker by the maker of it, to be sold in the market, and nothing was ever paid upon it to the maker. The maker paid the note at maturity to the bank, and gave notice to it of the circumstances under which the note had been given, and of the fact that he had never received any of the proceeds of the note. He also claimed of the bank, before it had called upon the pledgor to redeem, and gained any right of appropriation of the collections made, any surplus that might remain from the proceeds of the notes pledged after payment of the loan made thereon. The bank collected all the notes, and had a surplus above the amount of the loan. In an action by the maker against the bank it was held that he was entitled to recover so much of the proceeds of his note as was not, after the

[1] Third Nat. Bank v. Harrison, 3 McCrary 316; Bank v. Mann, 94 Tenn. 17, 24, 27 S. W. Rep. 1015; Logan v. Cassell, 88 Pa. St. 288, 32 Am. Rep. 453.

[2] Farwell v. Importers' & Traders' Nat. Bank, 47 N. Y. Superior Ct. 409; Garlick v. James, 12 Johns. (N. Y.) 146, 148, 7 Am. Dec. 294; Blydenburgh v. Thayer, 3 Keyes (N. Y.) 293.

[3] Lewis v. Varnum, 12 Abb. Pr. (N. Y.) 305; Wilson v. Little, 2 N. Y. 443.

application of the proceeds of the other notes, required to satisfy the loan.[1] The bank had no right to make an application of the proceeds of this note to the payment of the loan, before a time when a sufficient amount had been collected from the other notes to repay the loan, and therefore it became a *quasi*-trustee for the maker of this note as to proceeds of it.

§ 666. **If the collateral note be pledged with the understanding that it is not to be resorted to** unless the maker of the principal note fails to pay that at maturity, then a suit upon the collateral note can not be maintained until both notes are due.[2]

§ 667. **But a pledgee is not bound to collect the collateral security upon its maturity,** before the maturity of the principal debt, except upon the request of the pledgor, or in pursuance of an express contract to do so. Even where a creditor, receiving as collateral security the note of a third person, promised to use all reasonable means to collect it and account for it, it was held that by the subsequent payment of the principal debt he was absolved from all further obligation to collect the note, and was only bound to return it to the owner.[3]

A provision in an assignment of a judgment as collateral security, that if the debt secured be not paid at maturity, the creditor might sell the judgment at public sale, does not impose any obligation upon him to take steps for the collection of the judgment, before maturity of the principal debt.[4]

A pledgee who has taken as security notes secured by the retention of title to personal property, is under no obligation to maintain an action of replevin to recover possession of such property; and if he does so at the request and for the benefit of the pledgor, the pledgee is under no obligation to take charge of the property after its recovery, and advance money

[1] Farwell v. Importers' & Traders' Nat. Bank, 47 N. Y. Superior Ct. 409, 90 N. Y. 483.

[2] Moore v. Miller, 7 Ore. 486.

[3] Overlock v. Hills, 8 Me. 383.

[4] Bast v. First Nat. Bank, 101 U. S. 93, 19 Am. Law Reg. (N. S.) 306.

for expenses, and to sell it and apply its proceeds to the debt secured.[1]

§ 668. **A pledgee of negotiable bonds is entitled to demand payment of coupons as they fall due,** whether this be before or after the maturity of the debt which the bonds were pledged to secure. The bonds and the coupons are together pledged for the payment of the debt. The fact that the debt is not due when the coupons become payable, does not relieve them, any more than the bonds themselves, from the effect of the hypothecation.[2]

One who holds the bonds of a railroad company as collateral security for its debts, is entitled to enforce payment thereof, so long as the debts for which they were pledged remain unpaid.[3]

§ 669. **A pledgee may collect the collateral note in his own name,** if it was properly indorsed to him, either specially or in blank.[4] Such indorsement gives him the legal title. If the note be pledged without indorsement, the pledgee acquires the same rights that the assignee of a note not negotiable has; that is, he may bring suit upon it in the name of the payee.[5] An indorsement sufficient to pass the legal title to the note may, however, be made on a separate paper.[6]

The pledgee may sue collateral notes in his own name, although the indorsement to him be in the form, "Pay to A.

[1] Bank v. Chattanooga Pulley Co., 97 Tenn. 308, 37 S. W. Rep. 8.

[2] Warner v. Rising Fawn Iron Co., 3 Woods 514, 523. "To hold otherwise would be to hold that if the bonds themselves fell due before the debt secured by the pledge of the bonds, their hypothecation was without any effect whatever." Per Woods, J.

[3] Allen v. Dallas & Wichita R. Co., 3 Woods 316.

[4] Bowman v. Wood, 15 Mass. 534; Lobdell v. Merchants' & Manufacturers' Bank, 33 Mich. 408; Hilton v. Waring, 7 Wis. 492; Curtis v. Mohr, 18 Wis. 615; Kinney v. Kruse, 28 Wis. 183; Tarbell v. Sturtevant, 26 Vt. 513; Jones v. Hawkins, 17 Ind. 550; Houser v. Houser, 43 Ga. 415; Morton v. New Orleans & Selma R. Co., 79 Ala. 590, 621; Kavanaugh v. Brodball, 40 Neb. 875, 59 N. W. Rep. 517.

[5] Jones v. Witter, 13 Mass. 304; and see White v. Phelps, 14 Minn. 27, 33, 100 Am. Dec. 190.

[6] Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720.

B. (the pledgee) for account of C. D." (the pledgor). Such an indorsement is not inconsistent with the lien of the pledgee and the right of the latter to collect the notes and apply them to the account of the pledgor by discharging the debt they were pledged to secure. The special indorsement expresses no more than the understanding of the parties in every case of a pledge of a note.[1]

The pledgee can not maintain a suit upon the collateral after the secured debt is paid, except for the benefit of the pledgor.[2]

Under codes which dispense with the rule requiring the assignee of a chose in action to sue in the name of the assignor, a promissory note pledged by the payee without indorsement may be collected by the pledgee upon default by an action at law in his own name. There is nothing in the nature of such a pledge which indicates an intention to restrict the pledgee to a proceeding in chancery.[3]

§ 670. **If the pledgee is not invested with the legal title of the collateral,** so as to be entitled to maintain an action upon it in his own name, as where the paper is not negotiable in form, or where it has not been formally indorsed to him, it is his right to maintain a suit in the name of the pledgor or other legal owner of it. The delivery or transfer of the collateral to the pledgee by the legal owner implies authority to use the name of such legal owner, if necessary, for its collection. The pledgee is not entitled, by reason of not having the legal title himself, to maintain a bill in equity to have the collateral sold.[4]

§ 671. **The holder of collateral paper may sue and recover upon it of the maker, without regard to any defenses which**

[1] Nelson v. Wellington, 5 Bosw. (N. Y.) 178.

[2] Mutual Bank v. Burrell, 60 N. Y. Supp. 522, 29 Misc. Rep. (N. Y.) 322.

[3] White v. Phelps, 14 Minn. 27, 100 Am. Dec. 190.

In *Louisiana* it is well settled that the pledgee has the right to sue the pledged note in his own name. Bank of Lafayette v. Bruff, 33 La. Ann. 624; Ducasse v. McKenna, 28 La. Ann. 419.

[4] Whitteker v. Charleston Gas Co., 16 W. Va. 717.

the pledgor has upon the debt for which the paper was pledged as security, unless the maker of the collateral paper is thereby deprived of some equitable defense which he might have against the payee.[1] The fact that the right of property in the collateral paper has passed back to the payee, by his payment of the debt for which he pledged such paper as security, does not prevent the holder of it from maintaining an action upon it in his own name, so long as the maker remains liable. Whether such holder sue for himself, or as trustee for the payee, is immaterial.

§ 672. **If the maker of a collateral note pay it to the pledgor,** with knowledge that the payee has transferred it as collateral security, his payment is a nullity as to the pledgee, who may collect it notwithstanding such payment.[2]

§ 673. **The pledgee may enforce payment of accommodation paper held by him as collateral security,** to the extent of the principal debt for which it was pledged, and the maker has no right to have the collection of such paper enjoined until the creditor holding the same shall first exhaust other securities for the same debt placed with him by his debtor, even though the making of such paper was procured by fraudulent statements.[3] The principle of equity, that where a party has a lien on two funds, out of either of which his debt can be paid, and another has a lien on one only of the funds for his debt, the

[1] Bank of The University v. Tuck, 96 Ga. 456, 23 S. E. Rep. 467; Partridge v. Williams, 72 Ga. 807; Gammon v. Huse, 9 Ill. App. 557; Saylor v. Daniels, 37 Ill. 331, 87 Am. Dec. 250; Farmers' State Bank v. Blevins, 46 Kan. 536, 26 Pac. Rep. 1044; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. Rep. 526; Logan v. Smith, 62 Mo. 455; Crawford v. Spencer, 92 Mo. 498, 4 S. W. Rep. 713; Haas v. Bank of Commerce, 41 Neb. 754, 60 N. W. Rep. 85; Barmby v. Wolfe, 44 Neb. 77, 62 N. W. Rep. 318; Haydon v. Nicoletti, 18 Nev. 290, 3 Pac. Rep. 473; Logan v. Cassell, 88 Pa. St. 288, 32 Am. Rep. 453; Jackson v. Chemical Nat. Bank (Tex. Civ. App.), 46 S. W. Rep. 295; Union Nat. Bank v. Roberts, 45 Wis. 373.

[2] Fennell v. McGowan, 58 Miss. 261.

[3] Vanliew v. Second Nat. Bank, 21 Ill. App. 126; Bell v. Bean, 75 Cal. 86, 16 Pac. Rep. 521; Robbins v. Richardson, 2 Bosw. 248.

latter has a right to compel the former to resort to the other fund in the first instance for satisfaction of his debt, is applicable to sureties only. And the maker of such accommodation paper is in no sense a surety. He is a principal debtor on the note.[1]

But the maker of the accommodation paper which is the subject of a pledge is not liable upon it beyond the amount of the debt which it was pledged to secure.[2]

If a pledgee forecloses an accommodation note and mortgage, after receiving payment of the debt due him from the pledgor, he will be held as a trustee of the surplus for the benefit of the accommodation mortgagor.[3]

When a creditor obtains judgment upon the accommodation note of a third person held as collateral security, the judgment takes the place of the note, and stands as security merely for the principal debt.[4]

The payee of a promissory note, given as collateral security for his liability as indorser of another note made by the same person, may maintain an action thereon against the maker, although payment of the other note has not been enforced, and it is still outstanding and unpaid.[5]

§ 674. **The holder of the collateral paper may recover the full amount due upon it, although this exceed the debt for which it was pledged,** unless it is held subject to equitable defenses which the maker may have against his payee.[6] These

[1] Prout v. Lomer, 79 Ill. 331; Cronise v. Kellogg, 20 Ill. 11.

[2] Fisher v. Fisher, 98 Mass. 303; Duncan v. Gilbert, 29 N. J. L. 521; Allaire v. Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175; Atlas Bank v. Doyle, 9 R. I. 76; Maitland v. Citizens' Nat. Bank, 40 Md. 540; Beckhaus v. Commercial Nat. Bank (Pa.), 12 Atl. Rep. 72; Handy v. Sibley, 46 Ohio St. 9, 17 N. E. Rep. 329; Mechanics' & Traders' Bank v. Livingston, 4 Misc. (N. Y.) 255, 23 N. Y. Supp. 814, 53 N. Y. St. Rep. 693.

[3] Handy v. Sibley, 46 Ohio St. 9, 17 N. E. Rep. 329.

[4] Harding v. Hawkins, 141 Ill. 572, 31 N. E. Rep. 307.

[5] Hapgood v. Wellington, 136 Mass. 217.

[6] Tooke v. Newman, 75 Ill. 215; Partridge v. Williams, 72 Ga. 807; Crawford v. Spencer, 92 Mo. 498, 4 S. W. Rep. 713; Bank of Claflin v. Rowlinson, 2 Kan. App. 82, 43 Pac. Rep. 304; Cook v. Norwood, 106 Ill. 558; Saylor v. Daniels, 37 Ill. 331, 87 Am. Dec. 250; Seeley v. Wickstrom, 49 Neb.

defenses may be such as existed when the paper was taken as collateral, as where the paper was overdue when it was so taken; or they may be such as have arisen from subsequent transactions between the parties; as, for instance, when the pledgor has paid the debt for which the pledge was made, so that the holder of the collateral, in a subsequent suit upon it, must be regarded as acting as a trustee for the payee and as having only his rights.[1]

§ 675. **But if the paper be subject to equities in favor of the maker** against the original payee, the holder can recover in a suit upon it no more than the principal debt actually due him.[2]

730, 68 N. W. Rep. 1017; Barmby v. Wolfe, 44 Neb. 77, 62 N. W. Rep. 318; Haas v. Bank of Commerce, 41 Neb. 754, 60 N. W. Rep. 85; Morton v. New Orleans & Selma R. Co., 79 Ala. 590, 621; Bentley v. Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 584.

[1] Logan v. Cassell, 88 Pa. St. 288, 32 Am. Rep. 453.

[2] Cromwell v. Sac County, 96 U. S. 51; Goodman v. Simonds, 20 How. 343.

Arkansas: Brown v. Callaway, 41 Ark. 418.

California: Bell v. Bean, 75 Cal. 86, 16 Pac. Rep. 521.

Georgia: Exchange Bank v. Butner, 60 Ga. 654; Bank of University v. Tuck, 96 Ga. 456, 23 S. E. Rep. 467; Hatcher v. Independence Nat. Bank, 79 Ga. 547, 5 S. E. Rep. 111.

Illinois: Mayo v. Moore, 28 Ill. 428; Easter v. Minard, 26 Ill. 494; Saylor v. Daniels, 37 Ill. 331, 87 Am. Dec. 250; Steere v. Benson, 2 Ill. App. 560; Gammon v. Huse, 9 Bradw. 557; Vanliew v. Second Nat. Bank, 21 Ill. App. 126.

Indiana: Valette v. Mason, 1 Ind. 288.

Kansas: Farmers' State Bank v. Blevins, 46 Kan. 536, 26 Pac. Rep. 1044; Bank of Claflin v. Rowlinson, 2 Kan. App. 82, 43 Pac. Rep. 304; Williams v. Norton, 3 Kan. 295.

Louisiana: Louisiana State Bank v. Gaiennie, 20 La. Ann. 555; Gardner v. Maxwell, 27 La. Ann. 561.

Maryland: Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

Massachusetts: Roche v. Ladd, 1 Allen 436; Williams v. Cheney, 3 Gray 215; Stoddard v. Kimball, 6 Cush. 469, 4 Cush. 604; Fisher v. Fisher, 98 Mass. 303; Bond v. Fitzpatrick, 8 Gray 536, 4 Gray 89; Chicopee Bank v. Chapin, 8 Met. 40; New England Trust Co. v. New York Belting & P. Co., 166 Mass. 42, 43 N. E. Rep. 928.

Michigan: Lobdell v. Merchants' Bank, 33 Mich. 408; Garton v. Union City Nat. Bank, 34 Mich. 279.

Minnesota: St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. Rep. 526; White v. Phelps, 14 Minn. 27, 100 Am. Dec. 190.

Missouri: Grant v. Kidwell, 30 Mo. 455.

Montana: Yellowstone Nat. Bank v. Gagnon, 19 Mont. 402, 48 Pac. Rep. 762, 44 L. R. A. 243.

Nebraska: Barmby v. Wolfe, 44 Neb. 77, 62 N. W. Rep. 318; Haas v.

In a suit upon collateral paper which is subject to such defenses as the maker could set up against the payee, as, for instance, when the paper has been taken as collateral after its maturity, the holder can, of course, recover only the amount which the payee himself could recover.[1]

If a corporation pledge its own bonds as security for an indebtedness of its own in a smaller amount than the par value of the bonds, the creditor, in a suit against the company, can have judgment for only the amount of the debt, and not for the full amount of the bonds; although a purchaser of such bonds from the pledgee might be entitled to judgment upon them for their full amount.[2]

And so, if the maker of the collateral paper has any other good defense against the payee who has pledged it, the pledgee can collect no more than the amount of the debt secured;[3] but this is a matter of defense to be set up by such maker,[4] and the burden of proof is upon him to establish it.[5]

Bank of Commerce, 41 Neb. 754, 60 N. W. Rep. 85.

Nevada: Haydon v. Nicoletti, 18 Nev. 290, 3 Pac. Rep. 473.

New Jersey: Duncan v. Gilbert, 29 N. J. L. 521; Allaire v. Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

New York: Williams v. Smith, 2 Hill 301; Farwell v. Importers & T. Nat. Bank, 90 N. Y. 483; Kelly v. Ferguson, 46 How. Pr. 411; Mechanics & Traders' Bank v. Livingston, 4 Misc. 255, 53 N. Y. St. Rep. 693, 23 N. Y. Supp. 814, 6 Misc. 81, 55 N. Y. St. Rep. 394, 26 N. Y. Supp. 25; Huff v. Wagner, 63 Barb. (N. Y.) 215.

North Carolina: Kerr v. Cowen, 2 Dev. Eq. 356.

North Dakota: Security Bank v. Kingsland, 5 N. D. 263, 65 N. W. Rep. 697.

Ohio: First Nat. Bank v. Fowler, 36 Ohio St. 524, 38 Am. Rep. 610; Second Nat. Bank v. Hemingray, 34 Ohio St. 381.

Tennessee: Sawyer v. Moran, 3 Tenn. Ch. 35.

Vermont: Tarbell v. Sturtevant, 26 Vt. 513.

Wisconsin: Union Nat. Bank v. Roberts, 45 Wis. 373; Curtis v. Mohr, 18 Wis. 615; Bond v. Wiltse, 12 Wis. 612; Strong v. Bowes, 102 Wis. 542, 78 N. W. Rep. 921.

[1] Kelly v. Ferguson, 46 How. Pr. (N. Y.) 411.

[2] Jesup v. City Bank of Racine, 14 Wis. 331.

[3] Lacroix v. Derbigny, 18 La. Ann. 27.

[4] Vanliew v. Second Nat. Bank, 21 Ill. App. 126; Curtis v. Mohr, 18 Wis. 615.

[5] Duncan v. Gilbert, 29 N. J. L. 521; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; Gammon v. Huse, 9 Ill. App. 557.

§ 676. **A pledgee of accommodation paper can recover only the amount of the debt secured** to him by such pledge.[1] Upon receiving payment in full for the debt secured, the pledgee should surrender the collateral note to the accommodation maker; though, as a matter of prudence, he should obtain the pledgor's directions for such surrender.[2] Thus, if accommodation paper be indorsed as security for a pre-existing debt of a less amount, the indorsee is a holder for value in his own right only to the amount of the debt due him; and unless it appear that he is accountable to some third person for the surplus, he can recover no more than the debt for which he is a *bona fide* holder for value.[3]

The maker of the accommodation paper is not, however, exonerated from paying interest upon his note and the costs of a suit upon it.[4]

Upon the bankruptcy of the maker of the accommodation paper, the pledgee may prove for the whole amount of such paper, but he can receive dividends only to the extent of the debt for which the pledge was made.[5]

In a few cases it seems that the pledgee is restricted to collecting the amount for which the pledge was made only in case he knew that the paper pledged was accommodation paper.[6]

[1] *Ex parte* Kelty, 1 Low. Dec. 394, 14 Fed. Cas. 277; Robbins v. Richardson, 2 Bosw. (N. Y.) 248; Berenbroick v. Stephens, 8 N. Y. W. Dig. 163; Mechanics & Traders' Bank v. Livingston, 4 Misc. (N. Y.) 255, 53 N. Y. St. Rep. 693, 23 N. Y. Supp. 814; Blydenburgh v. Thayer, 1 Abb. App. Dec. (N. Y.) 156; Allaire v. Hartshorne, 21 N. J. L. 521, 47 Am. Dec. 175; Duncan v. Gilbert, 29 N. J. L. 521; Handy v. Sibley, 46 Ohio St. 9, 17 N. E. Rep. 329; First Nat. Bank v. Fowler, 36 Ohio St. 524, 38 Am. Rep. 610; First Nat. Bank v. Werst, 52 Iowa 684, 3 N.W. Rep. 711; Exchange Bank v. Butner, 60 Ga. 654; Mechanics & Traders' Bank v. Barnett, 27 La. Ann. 177; Forstall v. Fussell, 50 La. Ann. 249, 23 So. Rep. 273; Beckhaus v. Commercial Nat. Bank (Pa.), 12 Atl. Rep. 72; Atlas Bank v. Doyle, 9 R. I. 76, 11 Am. Rep. 219, 98 Am. Dec. 368.

[2] Teutonia Nat. Bank v. Loeb, 2 La. Ann. 110.

[3] Stoddard v. Kimball, 6 Cush. (Mass.) 469, 4 Cush. 604; Fisher v. Fisher, 98 Mass. 303.

[4] Mechanics & Traders' Bank v. Barnett, 27 La. Ann. 177.

[5] Kelty, *Ex parte*, 1 Lowell 394; Jones v. Hibbert, 2 Starkie 304.

[6] Atlas Bank v. Doyle, 9 R. I. 76, 11 Am. Rep. 219, 98 Am. Dec. 368; Mechanics' & T. Bank v. Barnett, 27 La. Ann. 177; Cook v. Norwood, 106 Ill. 558.

§ 677. **A pledgee of negotiable paper has no better title to the proceeds collected than he had to the paper itself.** Thus, the makers of a note payable to their own order indorsed and delivered it to a firm of note brokers to sell it at a limited discount. The brokers, without the knowledge or consent of the makers of the note, delivered it with others belonging to themselves to a bank as collateral security for a call-loan. Before the maturity of the note the makers notified the bank of their rights respecting the note; and afterwards paid it at maturity. At that time the bank had not received enough from the other collaterals to pay the loan, but afterwards did receive more than enough for that purpose. In an action by the makers of the note against the bank for an accounting, and to determine their respective rights to the proceeds of the note, and to compel payment of any portion not necessary to satisfy the lien of the bank, it was held that the bank, having received the note from the ostensible owners in ignorance of the plaintiff's rights, could hold it as security, yet the right of property did not pass, but remained in the plaintiff, subject to the lien of the pledgee; and that while the latter had the right to collect the note at maturity, as the loan had not been paid, the money collected remained as a substitute for the note, and subject to the equities of the makers, just as if the note had remained uncollected. After the makers of the note had given notice to the bank of their rights, they stood as mere sureties for the loan to the extent of their note, and could compel the bank to apply the proceeds of the securities belonging to the pledgors to the payment of the loan before resorting to the plaintiffs' note. Moreover, the plaintiffs were not bound to exhaust their remedy against the brokers who had misapplied the note, before seeking equitable relief by suit against the bank. No action against a wrong-doer is necessary in order to lay the foundation of an action against one to whom he has delivered the property in controversy.[1]

[1] Farwell v. Importers' & Traders' Nat. Bank, 90 N. Y. 483, 16 N. Y. Weekly Dig. 20, 27 Alb. L. J. 173; and see Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142.

latter notes, although the bank has had on deposit moneys belonging to the debtor, and has made no effort to collect the demand from such deposits.[1]

§ 665. **The pledgee may enforce payment of collateral paper upon its maturity,** although the principal debt has not then matured. Yet while he is entitled to collect a collateral note upon its maturity, he has no right to apply the proceeds to the payment of his loan until after default in the payment of that. The money when received is a substitute for the note, and is to be held upon the same terms, and subject to the same rights and duties as the note.[2] If the debt secured is payable at a definite time, no application of the proceeds of a collateral note can be made until that time arrives. If the debt secured is payable upon demand, a demand upon the debtor must be made before applying the proceeds of a collateral note.[3]

A loan upon call was obtained by a broker from a bank upon a pledge of several promissory notes for an amount exceeding the amount of the loan. One of these notes had been delivered to the broker by the maker of it, to be sold in the market, and nothing was ever paid upon it to the maker. The maker paid the note at maturity to the bank, and gave notice to it of the circumstances under which the note had been given, and of the fact that he had never received any of the proceeds of the note. He also claimed of the bank, before it had called upon the pledgor to redeem, and gained any right of appropriation of the collections made, any surplus that might remain from the proceeds of the notes pledged after payment of the loan made thereon. The bank collected all the notes, and had a surplus above the amount of the loan. In an action by the maker against the bank it was held that he was entitled to recover so much of the proceeds of his note as was not, after the

[1] Third Nat. Bank v. Harrison, 3 McCrary 316; Bank v. Mann, 94 Tenn. 17, 24, 27 S. W. Rep. 1015; Logan v. Cassell, 88 Pa. St. 288, 32 Am. Rep. 453.

[2] Farwell v. Importers' & Traders' Nat. Bank, 47 N. Y. Superior Ct. 409; Garlick v. James, 12 Johns. (N. Y.) 146, 148, 7 Am. Dec. 294; Blydenburgh v. Thayer, 3 Keyes (N. Y.) 293.

[3] Lewis v. Varnum, 12 Abb. Pr. (N. Y.) 305; Wilson v. Little, 2 N. Y. 443.

application of the proceeds of the other notes, required to satisfy the loan.[1] The bank had no right to make an application of the proceeds of this note to the payment of the loan, before a time when a sufficient amount had been collected from the other notes to repay the loan, and therefore it became a *quasi*-trustee for the maker of this note as to proceeds of it.

§ 666. **If the collateral note be pledged with the understanding that it is not to be resorted to** unless the maker of the principal note fails to pay that at maturity, then a suit upon the collateral note can not be maintained until both notes are due.[2]

§ 667. **But a pledgee is not bound to collect the collateral security upon its maturity,** before the maturity of the principal debt, except upon the request of the pledgor, or in pursuance of an express contract to do so. Even where a creditor, receiving as collateral security the note of a third person, promised to use all reasonable means to collect it and account for it, it was held that by the subsequent payment of the principal debt he was absolved from all further obligation to collect the note, and was only bound to return it to the owner.[3]

A provision in an assignment of a judgment as collateral security, that if the debt secured be not paid at maturity, the creditor might sell the judgment at public sale, does not impose any obligation upon him to take steps for the collection of the judgment, before maturity of the principal debt.[4]

A pledgee who has taken as security notes secured by the retention of title to personal property, is under no obligation to maintain an action of replevin to recover possession of such property; and if he does so at the request and for the benefit of the pledgor, the pledgee is under no obligation to take charge of the property after its recovery, and advance money

[1] Farwell v. Importers' & Traders' Nat. Bank, 47 N. Y. Superior Ct. 409, 90 N. Y. 483.

[2] Moore v. Miller, 7 Ore. 486.

[3] Overlock v. Hills, 8 Me. 383.

[4] Bast v. First Nat. Bank, 101 U. S. 93, 19 Am. Law Reg. (N. S.) 306.

debt, will be regarded as suspending the action.[1] But ordinarily the taking of such security does not impair or suspend the creditor's right of action upon the principal debt.[2] Thus, if the purchaser of land assume the payment of an existing mortgage upon the property already matured, his giving a bond payable at a future time as collateral security to the mortgage does not, in the absence of any accessory agreement, suspend the right of the holder of the mortgage to enforce payment of it forthwith.[3] Even a promise or covenant of the

[1] Harshaw v. McKesson, 65 N. C. 688.

[2] Hawks v. Hinchcliff, 17 Barb. (N. Y.) 492; West v. Carolina Life Ins. Co., 31 Ark. 476; Wilhelm v. Schmidt, 84 Ill. 183; Allen v. Clark, 65 Barb. (N. Y.) 563, 576; Willoughby v. Spear, 4 Bibb (Ky.) 397; Carson v. Buckstaff, 57 Neb. 262, 77 N. W. Rep. 670.

[3] Firemen's Ins. Co. v. Wilkinson, 35 N. J. Eq. 160, 178. Chief Justice Beasley, delivering the opinion of the court said: "The transaction between them was this: the one party gave, and the other party received, a bond conditioned for the payment of these moneys in one year after date, with the understanding that such bond should be collateral to the original bond and mortgage. Now, in terms, it is declared that this obligation is not to be substitutionary, that is, it is not to take the place of the primary obligation, but it is to be collateral to it. From what circumstance, then, is it to be deduced that such primary obligation is not to be enforced until the collateral obligation falls due? It is, indeed, argued that we can not suppose that the respondent, unless this effect were to ensue, would have taken upon himself this personal covenant; that he received nothing by it, if the appellant could at once proceed to foreclose the mortgage. But such a line of observation overlooks the fact that although the obligor in the collateral bond would obtain, from the nature of the transaction, no binding obligation against the immediate enforcement of the mortgage, he nevertheless put things in such a position as to render it extremely unlikely that such a step would be taken, and it is upon such probabilities that human conduct is very commonly founded. * * * The sole question is, How have the parties agreed; and all we know upon that subject is, that it was the understanding that a collateral bond would be given. That is the entire agreement. If they saw fit, they might have agreed that all proceedings in the original bond and mortgage should be suspended during the running of the new bond. But they did not make any special stipulation to this effect, and I have already said that such a stipulation is not to be inferred from the giving of such an instrument. The decisions forbidding such an inference are numerous." See, also, Neimcewicz v. Ghan, 3 Paige (N. Y.) 613, 11 Wend. 312; Jones on Mortgages, § 1190.

Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130, is a case where there was an express agreement to extend the original debt.

creditor, upon receiving collateral security not to sue the debtor until the securities shall be given up, is not a bar to a suit at law by the creditor, brought before giving up the securities; for it is a well-settled principle of the common law that a covenant not to sue within a limited time can not be so pleaded, the only remedy being a suit upon such covenant or promise for a breach of it; and the damages for such breach might be more or less than the amount of the debt secured.[1]

It is well settled that the mere taking of collateral security on time, without any agreement between the parties for a definite extension of the time of payment of the principal debt, does not, *per se*, operate to suspend the right of action upon the principal debt until the collateral security shall become due.[2]

But if a creditor accept his debtor's own note or check payable at a future day, it will operate to extend the right of action upon the debt until the maturity of the note;[3] and such extension will discharge a surety of the original debt, if it be without his consent.[4]

[1] Foster v. Purdy, 5 Met. (Mass.) 442.

[2] United States v. Hodge, 6 How. 279; Cary v. White, 52 N. Y. 138. A remark to the contrary in Pratt v. Coman, 37 N. Y. 440, is criticised as not necessary to the decision, and not supported by authority.

[3] Place v. McIlvain, 38 N. Y. 96, 97 Am. Dec. 777.

[4] Myers v. Welles, 5 Hill (N. Y.) 463; Fellows v. Prentiss, 3 Denio (N. Y.) 512, 45 Am. Dec. 484; Bangs v. Mosher, 23 Barb. (N.Y.) 478; Brooks v. Wright, 13 Allen (Mass.) 72; Andrews v. Marrett, 58 Me. 539; Appleton v. Parker, 15 Gray (Mass.) 173; Sayre v. King, 17 W. Va. 562, 573. In Sayre v. King the law upon this subject is quite fully and clearly stated by Green, C. J., delivering the opinion of the court. From an examination of the authorities, which, however, can not be fully reconciled, he deduces these propositions: "The taking of a bill or negotiable note for an existing debt is *prima facie* conditional payment thereof; but it may be shown by direct or circumstantial evidence that the bill or negotiable note was taken as an absolute payment, or as collateral security merely.

"If instead of commercial paper another chose in action, such as an unnegotiable note, a bond, a deed of trust or mortgage, or an obligation to deliver goods, be given by the debtor to his creditor, such chose in action is *prima facie* collateral security for the original debt; but it may be shown, by direct or circumstantial evidence, that such chose in action was received as an absolute or conditional payment. If any chose in action was received as

§ 682. **A creditor who has sold or transferred the collateral paper can not recover upon the principal debt** without accounting either for its face value or its actual value. By such sale or transfer he has made the collateral his own, and extinguished the principal debt, at least to the extent either of the nominal amount of the collateral or of its value.[1] The indorsement of a note passes the property in it to another, and is evidence that it was sold for a valuable consideration. If, after such indorsement, an action could be maintained on the original contract, the plaintiff would receive double satisfaction. The fact that the collateral note has proved worthless, and the creditor has made himself liable to his assignee for the payment of it, does not avail the creditor unless he has regained possession of it so that he can return it to his debtor upon receiving satisfaction for the principal debt.[2] The presumption is that a creditor, in transferring collateral paper, has received the full amount appearing to be due upon its face. But even if it appear that he has received less than the face of the paper, he would be regarded as having elected to accept satisfaction out of the collaterals, and would be bound by such election, and would not be permitted afterwards to resort to the principal debt to recover any deficiency occurring in this way. Having, without the authority of the principal debtor, transferred the securities to a third person, he will be held to

absolute payment of a preceding debt, it discharges the sureties in the original debt; and if received as conditional payment, and such chose in action is payable at a future time, it amounts to a suspension of the right of the creditor to sue on his original debt; and if taken without the consent of the sureties in the original debt, it discharges them from all liability. If such chose in action was received as collateral security, though it be payable at a future time, unless there was an agreement to postpone the right of suit on the original debt, proven by other evidence, direct or circumstantial, the taking of such collateral security does not suspend the right of action on the original debt, and therefore does not discharge the sureties from their liability therefor." But see Elwood v. Deifendorf, 5 Barb. (N. Y.) 398.

[1] Cocke v. Chaney, 14 Ala. 65; Spalding v. Bank of Susquehanna County, 9 Pa. St. 28; Harris v. Johnston, 3 Cranch 311, 318, per Marshall, C. J.; Hawks v. Hinchcliff, 17 Barb. (N. Y.) 502; Haber .v. Brown, 101 Cal. 445, 35 Pac. Rep. 1035.

[2] Cocke v. Chaney, 14 Ala. 65.

have elected to take them at their face, in satisfaction to that extent of the principal debt.[1] Furthermore, as the creditor holds the collateral securities in trust for the benefit of his debtor, after the discharge of the principal debt, if the securities upon their face represent a larger amount than the principal debt, the debtor may recover of the creditor, after he has disposed of the collateral paper, the excess of this over the amount of the principal debt.

§ 683. **It is no defense to a creditor's action upon the principal debt that he has irregularly foreclosed mortgages held as collateral, and himself become the purchaser.** Thus, a debtor having assigned to his creditor absolutely several mortgages of real estate to secure a note, the creditor foreclosed the mortgages and purchased the property. In a subsequent suit upon the principal debt the creditor offered to credit the sum obtained upon the foreclosure sales; but the debtor filed an affidavit of defense, wherein he averred that the creditor had acted as owner of the mortgages, and had sued them and purchased the property without notice to the debtor, and that he had sold the property for an inadequate sum of money, when by prudent management he might have obtained a much larger sum. It was held, however, that the affidavit of defense was insufficient, and that the plaintiff was entitled to judgment either for the balance of the claim or for the whole original amount of it, since, according to the defense, the collaterals have not been effectually sold, but have only been changed from mortgages of land to a title to the land itself, which is still held for the debtor's use; and therefore the creditor has constituted himself a trustee for the debtor, and so now holds the land only as he held the mortgages, as collateral security for the payment of the principal debt; and in that case the debtor may compel a reconveyance to himself on tender of the whole amount of the debt.[2]

[1] Hawks v. Hinchcliff, 17 Barb. (N. Y.) 492.

[2] Smith v. Bunting, 86 Pa. St. 116.

§ 684. **Judgment upon the collateral does not satisfy the principal debt.** Thus a recovery of judgment by the creditor against the maker of the collateral note, and against the principal debtor as indorser of that note, does not operate as a satisfaction of the original debt, nor constitute a bar to a suit upon that debt;[1] neither would the creditor's assignment of such judgment to the debtor, upon recovering part payment of the debt, operate as a satisfaction of the original debt beyond the amount so paid on account of it.[2] Judgment may be recovered both in the suit upon the collateral and upon the principal obligation, and either judgment may be collected; although, in case the judgment upon the collateral debt exceed the other, and it be collected in full, the surplus is of course held for the benefit of the debtor.[3] Neither does the recovery of judgment upon the principal debt, and the arresting of the body of the debtor upon execution, impair the creditor's right to hold and enforce the collateral security.[4]

§ 685. **A creditor holding collaterals is not bound first to apply them** before enforcing his remedy against the debtor.[5] Even the fact that the debtor is the maker of an accommodation note does not change this rule.[6]

But as an exception to this rule equity may require the creditor to apply collateral security before proceeding to enforce collection from the estate of a deceased debtor, when such collateral is ample, and the personal estate in the hands of his administrator is insufficient to pay the claim, and resort to the real estate would be necessary.[7]

In an action by a pledgee upon the debt secured by the pledge he is not required to account for non-negotiable securi-

[1] Burnheimer v. Hart, 27 Iowa 19, 1 Am. Rep. 209, 99 Am. Dec. 641; Hawks v. Hinchcliff, 17 Barb. (N. Y.) 492.

[2] Burnheimer v. Hart, 27 Iowa 19.

[3] Plant's Manufacturing Co. v. Falvey, 20 Wis. 200.

[4] Smith v. Strout, 63 Me. 205.

[5] Lewis v. United States, 92 U. S. 618; Ambler v. Ames, 1 D. C. App. Cas. 191.

[6] Lord v. Ocean Bank, 20 Pa. St. 384, 59 Am. Dec. 728. See Comstock v. Smith, 23 Me. 202.

[7] Alexander v. Alexander, 64 Ind. 541.

ties pledged to him by defendant, in the absence of any allegation or proof that he has lost or misappropriated them.[1]

If a holder of collateral securities negligently suffers them to be lost, he is chargeable therefor in a plea of set-off to the principal debt.[2]

§ 686. **A surety upon the principal note can not require the creditor to proceed upon the collateral security** before bringing suit against the surety. The latter may, at any time after the maturity of the debt, discharge it and take the security.[3]

But the circumstances may be such that the creditor will be bound to apply the proceeds of securities pledged by the principal debtor before resorting to other securities furnished by a surety.[4]

The indorsee of a negotiable note is not bound in the first place to resort to securities furnished by the payee, so as to enable the principal debtor to avail himself of a right of set-off against the payee which did not exist at the time of the transfer of the note.[5]

IV. *Negotiable Paper Taken in Payment.*

§ 687. **A debtor claiming that his creditor has agreed to accept collaterals held by him in satisfaction of his debt** must establish the defense by positive evidence. The mere acceptance, by a creditor, of a negotiable note of a third person makes it but collateral security; and nothing short of an actual agreement to receive it in payment, or some evidence from which a positive inference of discharge can be made, will

[1] Marberry v. Farmers' & Mechanics' Nat. Bank, 6 Tex. Civ. App. 607, 26 S. W. Rep. 215.

[2] Culver v. Wilkinson, 145 U. S. 205, 12 S. C. Rep. 832; Marberry v. Farmers' & Mechanics' Nat. Bank, 6 Tex. Civ. App. 607, 26 S. W. Rep. 215; Douglass v. Mundine, 57 Tex. 344, 347; Donnell v. Wyckoff, 49 N. J. L. 48, 7 Atl. Rep. 672; First Nat. Bank v. O'Connell, 84 Iowa 377, 51 N. W. Rep. 162.

[3] Brick v. Freehold Nat. Banking Co., 37 N. J. L. 307.

[4] Jenkins v. Gunnison, 50 Wis. 388, 7 N. W. Rep. 256, 423.

[5] Munger v. Albany City Nat. Bank, 85 N. Y. 580.

suffice to produce this effect.[1] The difficulty in the application of this rule has generally been found to be in determining what evidence is sufficient to establish the fact of the agreement, or to justify submitting the evidence to the jury as raising a question of fact for their determination.[2] When there is a conflict of evidence upon the question whether a note of a third person was received as payment, or merely as collateral, the question is one for the jury.[3] Such an agreement, when alleged to be contemporaneous with the creation of the debt, and is not mentioned in a written assignment of the collaterals, which are less in amount than the debt, will be considered as intrinsically improbable.[4] The fact that a pledgee of corporate stock has voted upon it at a stockholders' meeting does not show that he has agreed to accept it in payment of the debt, nor does it constitute a conversion of the stock.[5] After a creditor has obtained judgment upon the collateral note, and transferred this to his debtor, and the latter has received the benefit of it, he is estopped from setting up the defense that the collateral note was taken by the creditor towards payment of the debt.[6]

The taking of a note of a third person for an existing debt is deemed a *conditional* and not an absolute payment of the original debt, unless otherwise agreed between the parties.[7]

§ 688. **There is a distinction, however, between a note of a third person taken for an antecedent debt, and one accepted**

[1] Wilhelm v. Schmidt, 84 Ill. 183; Prettyman v. Barnard, 37 Ill. 105; Noel v. Murray, 13 N. Y. 167; and see Burlington Gas-Light Co. v. Greene, 22 Iowa 508. In Youngs v. Stahelin, 34 N. Y. 258, there is a dictum by Smith, J., that the presumption is that a creditor taking from his debtor the obligation of a third person takes it in payment and not as security; although this presumption may be rebutted by evidence to the contrary. But this is neither law nor sense.

[2] Wright v. Crockery Ware Co., 1 N. H. 281, 8 Am. Dec. 68; Whitney v. Goin, 20 N. H. 354; Noel v. Murray, 13 N. Y. 167, per Marvin, J.

[3] Atlantic F. & M. Ins. Co. v. Boies, 6 Duer (N. Y.) 583.

[4] Brown v. Hiatt, 1 Dill. 372; Kiser v. Ruddick, 8 Blackf. (Ind.) 382; Kelsey v. Rosborough, 2 Rich. (S. C.) 241.

[5] Heath v. Silverthorn Lead Mining & Smelting Co., 39 Wis. 146.

[6] Holmes v. Lykins, 50 Mo. 399.

[7] Kephart v. Butcher, 17 Iowa 240;

for property sold; for while a note taken for an antecedent debt is regarded only as a conditional payment, and in effect operates as collateral security, a note taken for goods sold is a payment.[1] In Whitbeck v. Van Ness,[2] where a note of a third person was taken upon the sale of a horse, and the note not being paid at maturity, the vendor brought suit against the purchaser for the price, the court said: "The intrinsic circumstances of this case plainly show that the plaintiff considered himself as taking the note at his own risk. It was made payable to the plaintiff himself, and the defendant, by not indorsing it, or guaranteeing the payment, clearly declined pledging his own responsibility. The offer was made of the note for the horse; the plaintiff took time to consider whether it was advisable to take the note, and, after deliberation, and we must presume, too, after inquiry, agreed to sell the horse for the note." In like manner, in Breed v. Cook,[3] it was consid-

Muldon v. Whitlock, 1 Cow.(N. Y.) 290, 306, 13 Am. Dec. 533; Whitbeck v. Van Ness, 11 Johns. (N. Y.) 408, 6 Am. Dec. 383; Johnson v. Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; Glenn v. Smith, 2 G. & J. (Md.) 493; McConnell v. Stettinius, 2 Gilm. (Ill.) 707; Shipman v. Cook, 16 N. J. Eq. 251; Tobey v. Barber, 5 Johns. (N. Y.) 68, 4 Am. Dec. 326; Butler v. Haight, 8 Wend. 535; Vail v. Foster, 4 N. Y. 312; Partee v. Bedford, 51 Miss. 84; Taylor v. Conner, 41 Miss. 722, 97 Am. Dec. 419; Guion v. Doherty, 43 Miss. 538; Lear v. Friedlander, 45 Miss. 559.

[1] Emly v. Lye, 15 East 7, 12; Clark v. Mundal, 1 Salk. 124, 12 Mod. 203; Ward v. Evans, 2 Ld. Raym. 928; Owenson v. Morse, 7 T. R. 60; Whitbeck v. Van Ness, 11 Johns. (N. Y.) 413, 6 Am. Dec. 383; Breed v. Cook, 15 Johns. (N. Y.) 241; Noel v. Murray, 1 Duer (N. Y.) 385; Ferdon v. Jones, 2 E. D. Smith (N. Y.) 106; Rew v. Barber, 3 Cow. (N. Y.) 272; Wise v. Chase, 44 N. Y. 337. In Clark v. Mundal, 1 Salk. 124, 12 Mod. 203, Lord Holt said, that if A. sells goods to B., and B. is to give a bill in satisfaction, B. is discharged, though the bill is never paid, for the bill is payment; but otherwise a bill should never discharge a precedent debt or contract; but if part be received, it shall be only a discharge of the old debt for so much. Bayard v. Shunk, 1 W. & S. (Pa.) 92, 37 Am. Dec. 441; Bicknell v. Waterman, 5 R. I. 43.

[2] 11 Johns. (N. Y.) 409, 413, 6 Am. Dec. 383.

[3] 15 Johns. (N. Y.) 241; and see Bank of England v. Newman, 1 Ld. Raym. 442, 12 Mod. 241, per Lord Holt, C. J. "If a man has a bill payable to him or bearer, and he delivers it over for money received, without indorsement of it, this is a plain sale of the bill, and he who sells it does not become a new security." And see Union Bank v. Smiser, 1 Sneed (Tenn.) 501; Long v. Spruill, 7 Jones (N. C.) L. 96.

ered that the purchaser's declaration, that he would not indorse the note, authorized the presumption that the note was taken in absolute payment. In accepting such a note without the purchaser's indorsement, the seller is considered as parting with his goods for the note, and as relying exclusively upon the credit and solvency of the parties thereto, and as waiving recourse upon the buyer, if it should turn out not to be good. In the cases mentioned it would seem that it was a matter of agreement, either express or to be implied from circumstances, that the transfer of the note at the time of the purchase of property should operate as payment absolutely. Of course, it would be competent for the parties to agree that such a transfer should operate only as collateral security, and such an agreement might also be inferred from circumstances attending the transaction.

§ 689. **Of course the parties may, by express agreement, make a third person's note payment of an existing demand.** Thus, where a debtor offered to deliver to his creditor such a note, or to pay him the money at an early date, and the creditor chose the note, and thereupon received it and credited it to the debtor, the note was held to have been received in payment.[1] When, upon a sale of goods, the note of a third person is expressly received in payment, the purchaser's indorsement of the note does not change the legal effect of the transfer as payment. The vendor can not in such case maintain an action for the price of the goods, although he produces the note and offers to surrender it upon the trial. In such case, the only engagement made by the purchaser is that of a commercial indorser. In strictness, he does not agree to pay for the goods, but agrees that, if the note be not paid upon due demand thereof at maturity, he will, on receiving due notice, pay the same. "The vendor may sell and does sell upon any terms that please him, and his contract of sale is a single contract. If by that contract he gives his goods for

[1] St. John v. Purdy, 1 Sandf. (N.Y.) 564; Union Bank v. Smiser, 1 Sneed 9; and see Mosley v. Floyd, 31 Ga. (Tenn.) 501.

half their value, he is bound. If he gives them for a note of the purchaser, he must abide its tenor. If he sells for the note of a third person, it is a mere exchange of property, and he can not look to the purchaser. If he requires a guaranty, general or conditional, he must pursue it. If he requires the purchaser to indorse the note for which he makes the sale, he holds such purchaser's liability as indorser, and nothing more.'"[1] The circumstance that the purchaser of goods, in transferring to the seller the note of a third person, with a view to add his own responsibility, indorses thereon an absolute guaranty, is evidence, and perhaps, conclusive evidence, that the note was given and received in payment.[2]

§ 690. **The inclination of courts to regard the obligation of a third person as collateral security,** when there is no express agreement that it shall be taken as payment, is shown in the following case: A farmer desiring to obtain a loan of two thousand dollars to pay off two mortgages upon his farm, one of which was not then due, negotiated for a loan of that sum upon a first mortgage of the farm. The lender applied to his own banker for the money; but the banker, though owing him more than that sum, could not well pay this amount at once, and it was therefore arranged that one half the amount should be paid over to the borrower, out of which one of the mortgages should be satisfied, and that the banker should give his certificate of deposit for the remaining half, payable to the order of the borrower at the time the other mortgage should become due; and the lender took a mortgage for two thousand dollars upon the farm. The banker failed before the certificate of deposit became payable, and upon the question whether the certificate of deposit was received as payment or as security only, it was held that the fair inference from all the facts was that it was only held as collateral, and that the loss upon the certificate should be borne by the lender.[3]

[1] Soffe v. Gallagher, 3 E. D. Smith (N. Y.) 507, per Woodruff, J.; and see Shipman v. Cook, 16 N. J. Eq. 251.

[2] Monroe v. Hoff, 5 Denio (N. Y.) 360.

[3] Burrows v. Bangs, 34 Mich. 304.

§ 691. **But in the absence of any agreement, either express or implied, the transfer of a note of a third person at the time of the purchase of property is presumed to be a payment.**[1] "Where there is no debt existing between the parties, and the one delivers property to the other, and receives in return the note of a third person in full or part payment, and gives a receipt saying that it is received in full or part payment, the presumption is that it was so received, and the *onus* is then upon the party receiving such note to show the contrary."[2]

If a purchaser deliver the note of a third person for goods purchased, knowing that the maker is insolvent, but representing him as a man of property, the taking of the note under such fraudulent misrepresentation will not be held to be payment for the goods.[3] But knowledge of the fact that the maker of a note given in exchange for merchandise had asked and obtained from one of his creditors a renewal of one of his notes, without security, alleging as an excuse—a fair one for a small manufacturer—that he had been short of water, is far from being knowledge of the insolvency of the maker, or of a fact from which insolvency should reasonably be inferred.[4]

V. *Diligence in Collecting Collateral Paper.*

§ 692. **A pledgee of negotiable paper is bound to use reasonable diligence** in the collection of it.[5] The diligence required

[1] Partee v. Bedford, 51 Miss. 84; Bayard v. Shunk, 1 W. & S. (Pa.) 92, 37 Am. Dec. 441.

[2] Noel v. Murray, 13 N. Y. 167, per Dean, J.; and see 1 Duer 385, per Oakley, C. J.

[3] Wilson v. Force, 6 Johns. (N. Y.) 110.

[4] Burgess v. Chapin, 5 R. I. 225.

[5] *Ex parte* Mure, 2 Cox 63; Williams v. Price, 1 Sim. & Stu. 581; Lawrence v. McCalmont, 2 How. 426; Slevin v. Morrow, 4 Ind. 425; Kiser v. Ruddick, 8 Blackf. (Ind.) 382; Reeves v. Plough, 41 Ind. 204; Word v. Morgan, 5 Sneed (Tenn.) 79, 81; Roberts v. Thompson, 14 Ohio St. 1, 82 Am. Dec. 465; Bridge Co. v. Savings Bank, 46 Ohio St. 224, 20 N. E. Rep. 339; Muirhead v. Kirkpatrick, 21 Pa. St. 237; Sellers v. Jones, 22 Pa. St. 423; Lyon v. Huntingdon Bank, 12 S. & R. (Pa.) 61, 67; Miller v. Gettysburg Bank, 8 Watts (Pa.) 192, 34 Am. Dec. 449; Bank of U. S. v. Peabody, 20 Pa. St. 454; Lishy v. O'Brien, 4 Watts (Pa.) 141; Girard F. & M. Ins. Co. v. Marr, 46 Pa. St. 504; Lamberton v. Windom, 12 Minn. 232, 18 Minn. 596, 90 Am. Dec. 301; Colquitt v. Stultz, 65 Ga. 305; Blouin v.

of him is the same in effect as that required of an agent or attorney employed to collect the demand.[1] In the first place, he is bound to exercise this diligence in fixing the liability of the parties to such paper, when necessary, by due demand of payment and notice of non-payment;[2] and, in the next place, he is bound to exercise this diligence in the collection of the paper. If he neglects, after the maturity of the paper, to enforce payment, he is liable to the pledgor for any loss upon the paper which might have been prevented by proper diligence in proceedings to collect it.[3] The creditor is not excused from attempting to collect a bill or note taken as collateral security, on the ground that the maker has declared that he has a defense which he will interpose.[4]

§ 693. **Reasonable diligence upon the part of the creditor in making demand and giving notice, so as to preserve the legal liability of indorsers** of the collateral note, is preliminary to diligence in enforcing payment of the note at maturity, and the requirements in both cases rest upon the same principle,

Hart, 30 La. Ann. 714; Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643, 56 Pac. Rep. 468; Noland v. Clark, 10 B. Mon. (Ky.) 239; Union Nat. Bank v. Post, 64 Ill. App. 404; Mueller v. Nichols, 50 Ill. App. 663.

[1] Buckingham v. Payne, 36 Barb. (N. Y.) 81; Hazard v. Wells, 2 Abb. N. C. (N. Y.) 444; Kephart v. Butcher, 17 Iowa 240; Lawrence v. McCalmont, 2 How. 426. For a case of an attorney taking collateral for a claim in his hands for collection, and agreeing with the debtor to collect the security, see Bradford v. Arnold, 33 Tex. 412.

[2] Foote v. Brown, 2 McLean 369; Peacock v. Pursell, 14 C. B. N. S. 728; M'Lughan v. Bovard, 4 Watts (Pa.) 308; Ormsby v. Fortune, 16 S. & R. (Pa.) 302; Russell v. Hester, 10 Ala. 535; Charter Oak Life Ins. Co. v. Smith, 43 Wis. 329; Jennison v. Parker, 7 Mich. 355.

[3] Lawrence v. McCalmont, 2 How. 426, 454; Pickens v. Yarborough, 26 Ala. 417, 62 Am. Dec. 728; May v. Sharp, 49 Ala. 140; Reeves v. Plough, 41 Ind. 204; Succession of Liles, 24 La. Ann. 550; Cardin v. Jones, 23 Ga. 175; Barrow v. Rhinelander, 3 Johns. Ch. (N. Y.) 614; Hawley Bros. Hardware Co. v. Brownstone, 123 Cal. 643, 56 Pac. Rep. 468; Aldrich v. Goodell, 75 Ill. 452; Hall v. Green, 14 Ohio 499; Charter Oak Life Ins. Co. v. Smith, 43 Wis. 329; Bonta v. Curry, 3 Bush (Ky.) 678; Noland v. Clark, 10 B. Mon. (Ky.) 239; Word v. Morgan, 5 Sneed (Tenn.) 79; Griggs v. Day, 136 N. Y. 152, 32 N. E. Rep. 612; Jennison v. Parker, 7 Mich. 355; Murphy v. Bartsch, 2 Idaho 603, 23 Pac. Rep. 82; Rumsey v. Laidley, 34 W. Va. 721, 12 S. E. Rep. 866.

[4] Wakeman v. Gowdy, 10 Bosw. (N. Y.) 208.

and are of equal obligation.[1] The reason for thus requiring the preservation of the legal validity of the pledge by the pledgee must be for the purpose of preventing its pecuniary value from being impaired, and because the pledgee only can do it. Upon what principle, then, can it be said that the pledgee is not required to use ordinary diligence to preserve the pledge from loss by the insolvency of third parties who are liable thereon? It is to be observed that it is not the insolvency of the debtor himself that is to be guarded against, but that of a third person; the great object in both cases is to preserve the pecuniary value of the property; to do this, active measures involving expense are required in the one case and are necessary in the other; the same degree of diligence is required in each case, and in both the pledgee alone can resort to the means necessary for the preservation of the pledge. But further, if the pledgee is not bound to do this, the debtor may be left entirely without remedy. A note given as collateral security may be due long before the principal debt matures. In such case the creditor is not bound to receive the debt until it is due, yet he has entire control of the collateral security, which may be the note of a third person who is on the eve of insolvency, while the creditor refuses to preserve the collateral security by its collection; the hands of the debtor are tied; he is in no default whatever, yet he must stand by and see his property becoming utterly worthless by the insolvency of the maker of the note; or if a remedy exists, it is to compel the creditor to active measures for the preservation of the debt, which is the very ground of objection to this defense.

[1] Peacock v. Pursell, 14 C. B. (N. S.) 728. Earle, C. J., said: "The legal effect of taking a bill as collateral security is, that if, when the bill arrives at maturity, the holder is guilty of laches, and omits duly to present it, and to give notice of its dishonor, if not paid, the bill becomes money in his hands as between him and the person from whom he received it." Williams, J.: "I am of the same opinion. The laches of the plaintiffs in not duly presenting the bill constituted this a payment before action brought." Willes, J.: "I am of the same opinion. If a creditor, when the bill falls due, is guilty of laches, whereby the security becomes deteriorated or valueless, it becomes equivalent to actual payment." See also, McLemore v. Hawkins, 46 Miss. 715.

"In case of an ordinary pledge of tangible personal property, the pledgee is bound to ordinary diligence in the preservation of the property, whether it be perishable or not. What would be ordinary diligence in one case would not be in the other; but the diligence is required, whatever may constitute it. The identical property, when it can, must be preserved; but if it can not, then the value must be preserved. Why will not the same rule apply to bills, notes, bonds, and other choses in action? It is not alone the bill, note, or bond that is pledged, for those are but the evidence of the indebtedness, but the indebtedness itself is the substantial matter of the pledge: it is as capable of protection as the paper or contract which is the evidence of it; the latter may be lost without impairing the former, but if the former is lost the latter is valueless. The indebtedness, then, is the substantial pledge; and as men in the exercise of ordinary care generally preserve property of their own of this character, they may, also, by the same care, preserve it when it is the subject of a pledge; and as between the parties to a contract of pledge like the one under consideration, we see no reason why the pledgee is not answerable when the pledge is lost through his negligence."[1] In the exercise of such ordinary care and diligence to preserve the collateral note from being lost by reason of the insolvency of the maker, it is requisite that the pledgee shall resort to active efforts to collect the note by action.[2]

The ground of a creditor's liability for a loss to his debtor, occurring through the creditor's negligence in enforcing the collateral security, is said to rest in the privity in contract between the debtor and creditor, established by the debtor's assignment of the collateral, which invests the creditor with the ownership of the collateral, for all purposes of dominion over the debt assigned. He alone is empowered to receive the

[1] Lamberton v. Windom, 12 Minn. 232, 247, 90 Am. Dec. 301, per McMillan, J.

[2] Whitin v. Paul, 13 R. I. 40; Wakeman v. Gowdy, 10 Bosw. (N. Y.) 208; Slevin v. Morrow, 4 Ind. 425; Lyon v. Huntingdon Bank, 12 S. & R. (Pa.) 61; Hoard v. Garner, 10 N. Y. 261; Williams v. Price, 1 S. & St. 581; *Ex parte* Mure, 2 Cox 63.

money to be paid upon it, and to control it, in order to protect his right under the assignment.[1]

If the collateral note is made payable at a designated bank and it falls due before the principal debt, it is the duty of the pledgee to see that the note is presented at that bank for payment, or lodged in that bank for collection when due.[2]

§ 694. **A delay of three days after the maturity of a draft** held as collateral before presenting it for payment renders the holder liable for a loss occasioned by the insolvency of the drawer occurring immediately after this.[3] "The fair construction of the contract of the parties is, that the creditor will use proper diligence in the collection of the security, and will account for the same, and he is certainly forbidden such negligence as shall produce loss to the debtor who transfers the paper to him. His duties arise out of the transaction. He receives from his debtor a draft or negotiable paper, which, by law, is due on a certain day. It is his duty to present the paper for payment on that day, and, as he has the indorsement of his debtor on the paper, he ought probably to give him notice of the failure to pay; certainly so if he seeks to hold him on the paper or his indorsement. The question of notice to the indorsing debtor in this case is not, however, material. The question is whether there was a neglect of duty on the part of the creditor receiving the draft, by reason of which the debtor has been injured. That this is true is beyond question. If the creditor had received of his debtor a check and failed to present it the principle would have been the same precisely."[4]

§ 695. **A pledgor is not entitled to strict notice of the dishonor of a collateral note,** which he has not indorsed, but has delivered without indorsement, or has caused to be made pay-

[1] Hanna v. Holton, 78 Pa. St. 334, 21 Am. Rep. 20, per Agnew, J.; Lyon v. Huntingdon Bank, 12 S. & R. (Pa.) 61, 68, per Tilghman, C. J.; Beale v. Bank, 5 Watts (Pa.) 529.

[2] Bridge Co. v. Savings Bank, 46 Ohio St. 224, 20 N. E. Rep. 339; Ward v. Smith, 7 Wall. 447; Wallace v. M'Connell, 13 Pet. 136.

[3] Betterton v. Roope, 3 Lea (Tenn.) 215; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690.

[4] Betterton v. Roope, 3 Lea (Tenn.) 215, per Freeman, J.

able directly to his pledgee.[1] Although the pledgor in such case continues liable for his own debt in the event of a failure of the maker of the collateral note to pay it, yet he is not, within the custom of merchants, an indorser of it, so as to be entitled to strict regular notice of non-payment. He is not subject to the obligations nor entitled to the advantages which belong to a party to negotiable paper. He stands rather in the position of a guarantor. His original liability remains as it was; and he can avail himself of the negligence of the pledgee to give him notice of the dishonor of the collateral note only to the extent of the loss he may have suffered thereby. If he has suffered no loss by reason of delay or failure to receive notice of the dishonor of the collateral paper, he can not avail himself of this as a defense to his liability to his creditor.

§ 696. **The collateral security should be in hand in making demand** upon the maker of a note in order to charge an indorser; for it may be essential to have the collaterals deposited as security for the note in readiness to deliver up at the time, if the maker demands them. Thus, a demand by a notary upon the maker of a note, which contains a statement that certain negotiable bonds had been deposited as collateral security, is insufficient to charge an indorser, if the maker at the time of the demand asks for a return of the collaterals, and states that he is ready and willing to pay the note on production of the collaterals, and refuses to pay solely on the ground that they are not produced. It is as much the right of the maker to receive the collaterals upon the payment of the note, as it is to receive a surrender of the note itself; and it would be unreasonable to require him to pay such a note in the absence of the collaterals, and trust to his legal remedies against the holder to recover them.[2]

§ 697. **The neglect or omission of an officer of government,** who has received a note as collateral security for a debt due

[1] Chitty on Bills, 441, 498; Hunter v. Moul, 98 Pa. St. 13.

[2] Ocean Nat. Bank v. Fant, 50 N.Y. 474.

the state, to perform the duties which the law, in ordinary cases, imposes upon a party so receiving a note, can not be taken advantage of by the debtor. And it would seem that even if the officer expressly assumed the responsibility of prosecuting such note to judgment, the state would not be responsible for his laches.[1]

§ 698. **The character of the transaction is a question of fact for the jury when the circumstances of the case leave it in doubt** whether a note was deposited as collateral security or merely for the convenience of the owner; as, for instance, where a note was payable in metal, and the owner left it in care of a creditor, and the owner contended that the note was deposited as collateral security; but the creditor claimed that he received it merely for the owner's convenience, that the metal in which it was payable might be received by him and accounted for by credit on book account.[2]

§ 699. **The insolvency of the maker of the collateral note has been held not to dispense with a demand** of payment within a reasonable time, for the reason that the maker may pay this particular debt, although he is unable to pay all his debts, or is without visible property.[3]

§ 700. **What constitutes negligence in the collection of such collateral security** is a question of fact to be determined according to the circumstances of the case.[4] Greater diligence may be required in case the creditor is aware that the maker of the collateral paper is in embarrassed circumstances, than would be required in case the maker were supposed to be wholly responsible.[5] A delay to collect which would amount to negli-

[1] Seymour v. Van Slyck, 8 Wend. (N. Y.) 403.

[2] Sellers v. Jones, 22 Pa. St. 423.

[3] Stocking v. Conway, 1 Port. (Ala.) 260.

[4] Word v. Morgan, 5 Sneed (Tenn.) 79; Buckingham v. Payne, 36 Barb. (N. Y.) 81; Sellers v. Jones, 22 Pa. St. 423; Davis v. Alston, 61 Ga. 225. But it is sometimes said that the degree of diligence required under the circumstances of the case is a question of law. Wakeman v. Gowdy, 10 Bosw. (N. Y.) 208.

[5] Slevin v. Morrow, 4 Ind. 425.

gence in the former case, might not be so in the latter. Diligence which is reasonable under the circumstances of the case, and not extraordinary diligence, is what is required.[1] Ordinary care and diligence must be used,[2] and the circumstances of the case are to be considered in determining the extent of this responsibility. This responsibility is not determined by the strict rules of commercial law applicable to negotiable paper; but rather by the principles of the general law of agency.[3]

Negligence of the creditor in collecting collateral security may be taken advantage of by the surety of the principal debt as well as by the principal debtor himself,[4] but a general creditor can not complain.[5] The creditor's obligation to collect the collateral ceases upon the payment to him of the principal debt. It is his duty then to return the collateral to his debtor.[6]

A creditor holding negotiable paper as collateral security is required to use a different kind of diligence from that required of one holding merchandise or other corporeal property; and yet the diligence in each case is only such as is appropriate to the nature of the property. If the property be precious stones, safe keeping is all that is required. If it be grain, it must be properly stored and protected from all injury. The diligence required of the holder of promissory notes or other securities for the payment of money has reference to the danger that the

[1] Slevin v. Morrow, 4 Ind. 425; Kiser v. Ruddick, 8 Blackf. (Ind.) 382; Whitin v. Paul, 13 R. I. 40.

[2] Roberts v. Thompson, 14 Ohio St. 1, 82 Am. Dec. 465; Whitin v. Paul, 13 R. I. 40. So by statute in *Georgia*, Code 1873, § 2145; Cardin v. Jones, 23 Ga. 175.

[3] Roberts v. Thompson, 14 Ohio St. 1; Commercial Bank v. Martin, 1 La. Ann. 344, 45 Am. Dec. 87. "The duty of a pledgee can not be considered as more onerous and stringent than that of an agent; and the law is well settled that where, in the course and from the nature of the business, it becomes necessary to employ sub-agents, by reason of their particular profession or skill, the agent will not, in such cases, be responsible for the negligence or misconduct of the sub-agent, if he has used reasonable diligence in his choice as to the skill and ability of the sub-agent." Per Slidell, J.

[4] Hoffman v. Johnson, 1 Bland (Md.) 103.

[5] Dyott's Estate, 2 W. & S. (Pa.) 463.

[6] Overlock v. Hills, 8 Me. 383.

parties liable on them may become insolvent and unable to pay. A prudent business man will collect such obligations when they are due, or will endeavor to enforce them by suit; if, therefore, a creditor neglects to enforce the collection of such securities held in pledge, and delays till the parties liable become insolvent, he is as much guilty of neglect as if he had suffered grain held in pledge to be destroyed by dampness or heat for lack of proper storage.[1]

Negligence which will discharge the drawer or indorser of a bill of exchange will make one who holds it as collateral security liable for the loss.

§ 701. **Whether the creditor's negligence conclusively makes him liable,** as, for instance, whether his failure to protest a note for non-payment at maturity so as to charge an indorser thereby conclusively makes the paper his own, or whether he may show that his debtor sustained no actual damage by failure to charge the indorser, for the reason that the indorser was insolvent when the paper matured, and has continued so up to the time of trial—is a question upon which the authorities are not agreed. On the one hand, it is claimed that to allow such evidence would introduce an element of uncertainty as to the rights and liabilities of parties to negotiable paper, and give rise to much needless litigation. Moreover, the paper may be valuable to the pledgor by way of set-off, although uncollectible by the pledgee. Upon this ground, it is held in Michigan that the creditor is in every case chargeable with the amount of the note.[2]

If the collection of collateral negotiable paper has been lost by operation of the statute of limitations, and such statutory defense has become perfect, the pledgor in an action upon the principal debt may by a counter claim recover the value of his collateral, even though it be not known that the debtor

[1] Hazard v. Wells, 2 Abb. N. C. (N. Y.) 444, per Smith, J.

[2] Whitten v. Wright, 34 Mich. 92; Rose v. Lewis, 10 Mich. 483, 485; Jennison v. Parker, 7 Mich. 355, Campbell, J., dissenting; Phœnix Ins. Co. v. Allen, 11 Mich. 501, 83 Am. Dec. 756.

will, when sued upon the collateral, plead the statute in defense.[1]

§ 702. **On the other hand, it is held that actual loss or prejudice to the pledgor is the criterion** of the pledgee's liability for failure to charge the indorser, or for negligence in prosecuting the collection of the collateral.[2] Mere neglect on the part of the creditor in collecting the securities, without proof that loss has occurred through such neglect, will not make the securities his own.[3] In Kephart v. Butcher,[4] Judge Dillon, after examining the conflicting authorities upon this question, said it was one difficult of determination upon authority, but easy of solution upon reason and principle, and declared the opinion of the court to be that the better and true rule and criterion are actual loss or prejudice; and consequently the creditor who has taken the note of a third person for a pre-existing debt is not debarred from resorting to the original consideration, although he has not presented the instrument nor given notice of its dishonor, provided he can clearly and

[1] Hawley Brothers Hardware Co. v. Brownstone, 123 Cal. 643, 56 Pac. Rep. 468; First Nat. Bank v. O'Connell, 84 Iowa 377, 51 N. W. Rep. 162.

[2] Story on Notes, § 405; Chitty on Bills, 441, 498; 2 Parsons on Bills and Notes, 184; Cumber v. Wane, 1 Smith's Lead. Cas., 8th Eng. ed., 357; Chamberlyn v. Delarive, 2 Wilson 353; Ward v. Evans, 2 Ld. Raym. 928; Van Wart v. Woolley, 3 Barn. & C. 439; Peacock v. Pursell, 14 C. B. (N. S.) 728; Clark v. Young, 1 Cranch 181; Kennedy v. Rosier, 71 Iowa 671, 33 N.W. Rep. 226; Kephart v. Butcher, 17 Iowa 240; Powell v. Henry, 27 Ala. 612. See dissenting opinion of Campbell, J., in Jennison v. Parker, 7 Mich. 361; Grove v. Roberts, 6 La. Ann. 210; Hunter v. Moul, 98 Pa. St. 13, 42 Am. Rep. 610; Hanna v. Holton, 78 Pa. St. 334, 21 Am. Rep. 20; Westphal v. Ludlow, 6 Fed. Rep. 348; Plymouth County Bank v. Gilman, 9 S. D. 278, 68 N. W. Rep. 735; Douglass v. Mundine, 57 Tex. 344; National Bank v. Bruhn, 64 Tex. 571; Carpenter v. Sanborn (Tex. Civ. App.), 25 S. W. Rep. 36; Hanover Nat. Bank v. Brown (Tenn. Ch. App.), 53 S. W. Rep. 206.

[3] Gilbert v. Marsh, 12 Hun (N. Y.) 519; Aldrich v. Goodell, 75 Ill. 452; Steger v. Bush, S. & M. Ch. (Miss.) 172, 189. "Something more than mere delay is necessary in such cases; because mere delay, if no loss followed as a consequence thereof, could not be made the foundation of any complaint on the one hand or of responsibility on the other." Per Buckner, Chancellor.

[4] 17 Iowa 240.

satisfactorily show that the debtor has not, in consequence of such omission, sustained any injury.

It would seem that, in order to hold the creditor liable for negligence or delay in enforcing the collateral note, it should be made to appear that the maker of that note was solvent at the time it matured, and afterwards became insolvent.[1] "There is a distinction taken between the liability of a creditor to a principal debtor for negligently failing to collect collateral securities pledged by such debtor, and the liability of a creditor to a surety for neglecting to proceed against a principal. We can, however, conceive of no reason why the rule, which in the latter case requires that, in order that the creditor be held liable, the principal debtor should be solvent at the time when the surety requests the creditor to proceed against him, should not apply in principle in the former case. In the case of Herrick v. Borst,[2] it is said: 'The question to be decided is, whether under our rule for the protection of sureties a jury should be allowed to speculate on the event, and bar the creditor accordingly, as they may guess that the suit against the principal would have been successful or not. I understand the rule to be, not that the jury can appraise the possibility, and relieve the surety in proportion to the value of the chance, but that if the principal was solvent when the notice was given, and the neglect to sue be followed by subsequent insolvency, the whole action is barred.' It seems to us that these reasons for making the solvency of the principal necessary to the creditor's responsibility to the surety apply with equal force in a case like this at bar. There is the same danger and impropriety in the latter as in the former, in permitting a jury to speculate upon the chances of success in collecting a debt of a person who is not solvent; a person, according to the definition given in the case cited, who is not able to pay all his debts from his own means, or whose property is not in such a situation that all his debts may be collected out of it by legal process. To make

[1] Lamberton v. Windom, 18 Minn. 301; Westphal v. Ludlow, 6 Fed. Rep. 506, 514, 12 Minn. 232, 90 Am. Dec. 348.

[2] 4 Hill (N. Y.) 650, 653.

the liability of the creditor depend upon his ability to collect from a person in this condition would be, it seems to us, to ingraft an element upon commercial law altogether inconsistent with its characteristic and necessary certainty.'"[1]

If the debtor has in his hands good security for the payment of the collateral note, he can not be prejudiced by the failure of the pledgee to protest the note, and in that case the pledgee can not be held liable for his neglect.[2]

§ 703. **If it appears that upon the maturity of the collateral note it could not have been collected** except by the exercise of extraordinary diligence, or if a suit brought upon it as soon as it matured, and prosecuted with reasonable diligence to judgment and execution, would not have resulted in the collection of the note, in the absence of a demand by the debtor that such a suit be brought, the creditor in a suit upon the principal debt will not be prevented from recovering because he did not attempt to collect the collateral.[3]

§ 704. **If the pledgor desires a prompt collection of the collateral, he should demand this;** and unless he do this the pledgee is not bound to act immediately upon the maturity of the principal debt, but only to exercise ordinary diligence and a reasonable discretion in the matter.[4]

§ 705. **The burden is upon the debtor** to show that the creditor has, by his negligence in collecting the collateral security, occasioned a loss.[5] When a *prima facie* case of negligence in

[1] Lamberton v. Windom, 18 Minn. 506, 515, 90 Am. Dec. 301, per Berry, J.

[2] Kephart v. Butcher, 17 Iowa 240.

[3] Marschuetz v. Wright, 50 Wis. 175, 6 N. W. Rep. 511; Westphal v. Ludlow, 6 Fed. Rep. 348.

[4] Cherry v. Miller, 7 Lea (Tenn.) 305; Baker v. Burkett, 75 Miss. 89, 92, 21 So. Rep. 970; Rice v. Benedict, 19 Mich. 132; Robinson v. Hurley, 11 Iowa 410; Smouse v. Bail, 1 Grant's Cas. (Pa.) 397; Culver v. Wilkinson, 145 U. S. 205, 213, 12 S. C. Rep. 832.

[5] Girard F. & M. Ins. Co. v. Marr, 46 Pa. St. 504; Sellers v. Jones, 22 Pa. St. 423; Covely v. Fox, 11 Pa. St. 171; Vose v. Yulee, 4 Hun (N. Y.) 628; Dugan v. Sprague, 2 Ind. 600; Kiser v. Ruddick, 8 Blackf. (Ind.) 382; Murphy v. Bartsch, 2 Idaho 603, 23 Pac. Rep. 82.

the creditor is shown, the burden is then cast upon him to show some excuse for his failure to collect the security. Such a *prima facie* case is made out by proof that the creditor, to whom a loss upon a policy of insurance was payable, neglected, for a month after the loss was adjusted and payable, to collect the amount, during which time the insurer was able and willing to pay, but afterwards became insolvent, and most of the insurance money was lost.[1]

On the issue of a pledgee's negligence in enforcing a note and mortgage held as collateral security the fact that the pledgee placed them in the hands of reputable attorneys for collection would not warrant the court in directing a verdict in his favor in a suit against the pledgor where the evidence tended to show that the security was lost by the negligence of the attorneys.[2]

§ 706. **Delay by a creditor to bring suit upon the collateral** for three months may make him liable for a loss occurring meanwhile, through the insolvency of the parties liable upon it; and it is no excuse for such delay that a defense to the collateral obligation is threatened.[3] Neither is it any excuse that the maker of such collateral resides in another state.[4]

But a delay for five months to collect a note payable on demand, taken as collateral security for a debt payable on demand, was held not to make the creditor chargeable with a loss occurring through the insolvency of the maker of the collateral note, where the maker was supposed to have ample property and not to be embarrassed, and the debtor had not requested his creditor to collect the note.[5]

In an action against a pledgee to recover the value of a note pledged as security, upon the ground that the makers of such collateral note have become insolvent, but were solvent at

[1] Charter Oak Life Ins. Co. v. Smith, 43 Wis. 329.

[2] Plymouth County Bank v. Gilman, 6 Dak. 304, 50 N. W. Rep. 194.

[3] Wakeman v. Gowdy, 10 Bosw. (N. Y.) 208.

[4] Burt v. Horner, 5 Barb. (N. Y.) 501. See, however, Noland v. Clark, 10 B. Mon. (Ky.) 239.

[5] Goodall v. Richardson, 14 N. H. 567.

specified times when it might have been collected, judgment should be ordered for the pledgee, where the insolvency of the makers of such note at such times is proved.[1]

§ 707. **Delay with debtor's consent.** A creditor holding promissory notes as collateral security is not liable for a loss occasioned by his delay to enforce the notes until the maker becomes bankrupt, if such delay was with the debtor's consent.[2] Neither is the creditor liable to account for collaterals which were never placed in his hands or under his control, but which were placed by the debtor in the hands of a third person appointed by himself,[3] or were placed by the debtor in the hands of his own lawyer for collection.[4] Neither is the creditor bound, after his lien has been discharged by payment of the principal debt, to do anything further about collecting the collateral note. Such payment absolves him from all further obligation about the collateral except to return it to the debtor.[5]

§ 708. **Bad faith or faulty discretion on the part of the pledgee,** in the course taken by him in respect to the collection of the collateral, must be proved in order to make him liable for any loss or depreciation that may have occurred from his delay. In a case where the collateral was a mortgage and mortgage note, and the pledgee refrained for nine months from proceeding to enforce it, the pledgee having exercised good faith toward the pledgor, and reasonable judgment in collecting the mortgage, he was held not to be chargeable with the collateral as a payment upon his demand.[6] Among the circumstances adverted to by the court, as showing that the pledgee was not under the necessity of proceeding sooner to enforce the collateral, were these: proceedings on the part of

[1] Spencer v. Plano Manuf. Co. (Minn.), 81 N. W. Rep. 538.

[2] Runals v. Harding, 83 Ill. 75; Mitchell v. Levi, 28 La. Ann. 946; Lee v. Baldwin, 10 Ga. 208; and see Brown v. Hiatt, 1 Dill. 372.

[3] Bank of the United States v. Peabody, 20 Pa. St. 454.

[4] Noland v. Clark, 10 B. Mon. (Ky.) 239.

[5] Overlock v. Hills, 8 Me. 383.

[6] Wells v. Wells, 53 Vt. 1.

the pledgee were pending to enforce the principal debt; the maker of the mortgage note had no property subject to attachment or execution, and the mortgage could only be enforced by strict foreclosure, which would have given the pledgee land and not money; the land moreover was incumbered by a prior mortgage, which the pledgee would have been obliged to redeem in order to hold the land, which, after he had obtained, was only a farm of inadequate and doubtful value; and the expense of the foreclosure would have to be met by the pledgee; and all the while if the pledgor had desired to have the mortgage foreclosed, he had the right to take proceedings for that purpose on his own behalf.

§ 709. **There is no obligation resting upon one who receives a note of a third person as conditional payment to bring suit upon it** if it be not paid at maturity. Such is the case when a note is transferred for property purchased on an agreement that if the note be not collected, the purchaser is to make up the deficiency to the seller. If the note be not paid at maturity, and the purchaser wishes to have suit brought upon it, he may at any time pay the amount of the dishonored note, and take his own course for its collection.[1]

Although the pledgee is *prima facie* the owner of a promissory note transferred to him in pledge, he is not prevented by this fact from authorizing the pledgor, the real owner of the note, from instituting suit upon it.[2]

§ 710. **A pledgee of a judgment may be liable for a loss occurring through his negligence in permitting the lien to expire.** Such would be the case if it was within his power to continue or revive the lien, and the judgment was collectible, and the judgment debt afterwards becomes worthless through the insolvency of the judgment debtor.[3]

[1] Dodge v. Stanton, 12 Mich. 408; Rice v. Benedict, 19 Mich. 132; Baker v. Burkett, 75 Miss. 89, 92, 21 So. Rep. 970.

[2] Hewitt v. Williams, 47 La. Ann. 742, 17 So. Rep. 269.

[3] Hanna v. Holton, 78 Pa. St. 334, 21 Am. Rep. 20.

One holding an assignment of a judgment as collateral security is not bound to collect it before the principal debt has become due, unless he has expressly agreed to do so. Therefore where a judgment was assigned, as security for the payment of certain notes, by a written assignment giving authority to the pledgee to sell it in case the notes should not be paid at maturity, and there was no provision in the assignment for the collection of the judgment before that time, it was held that evidence was not admissible to show a parol agreement, made at the time of the transaction, and as a part of it, that the pledgee should issue execution and collect the judgment whenever the money could be made thereon. A loss by failure to collect the judgment before the maturity of the notes secured, when the judgment debtor had property subject to execution sufficient to satisfy it, consequently fell upon the pledgor.[1]

§ 711. **A surety of the debt has the right to exact of the creditor proper care and diligence in the collection of collateral security** deposited with the creditor by the debtor; and want of diligence in this respect on the part of the creditor operates to release the surety to the amount of the loss actually sustained. The creditor in such case is regarded in the light of a trustee for the surety of the property pledged.[2]

If, however, such security be confided to a trustee, who is the common agent of both the debtor and the creditor, the latter can not be charged as the bailee of the trust property.[3] But if he connives at any mismanagement of the property by the trustee, he may be held responsible for the result of such mismanagement.[4]

If a pledgee sell the debt secured and assign the collateral note, and the assignee allows such note to become barred by the statute of limitations, he can not afterwards recover of the payee as indorser of such note.[5]

[1] Bast v. Bank, 101 U. S. 93.

[2] Hall v. Hoxsey, 84 Ill. 616, per Craig, J.; Murrell v. Scott, 51 Tex. 520.

[3] Bank of the United States v. Peabody, 20 Pa. St. 454.

[4] Murrell v. Scott, 51 Tex. 520.

[5] Fennell v. McGowan, 58 Miss. 261.

§ 712. **A creditor is in equity entitled to the benefit of collateral security given by his debtor to a surety** for the latter's indemnity;[1] and under some circumstances he may have the benefit of such security even after the surety's discharge. Thus, the maker of a promissory note having given a judgment bond to an indorser to indemnify him, the note was protested at maturity for non-payment, but due notice not being given to the indorser, he was discharged. The indorser, however, afterwards assigned the judgment to the holder of the note, in consideration of being released from all responsibility on his indorsement. This assignment was held to be a waiver of due notice, and tantamount to a promise to pay; and it was further held that a subsequent mortgagee or judgment creditor had no equity to allege against such a waiver of want of notice in order to avoid the judgment so given for the indemnity of the indorser.[2]

§ 713. **A creditor to whom a mortgage, or judgment, or other claim has been assigned as collateral security is in like manner chargeable for a loss** happening through his neglect to collect it.[3] Thus, it would seem that if a creditor holding a mortgage as collateral security should omit for an unreasonable length of time, after its maturity, to cause proceedings for foreclosure to be commenced; or if he should employ an incompetent solicitor to commence and prosecute them; or if the proceedings, after being commenced, were unduly delayed by his own negligence or that of his solicitor, he would be liable for the loss so happening. Such was held to be the law in a case where a creditor, receiving a mortgage of a third person to collect and apply to his own claim and to pay the

[1] Curtis v. Tyler, 9 Paige (N. Y.) 432; Evertson v. Booth, 19 Johns. (N. Y.) 486; Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 119, 129. See §§ 523–533, 7 Am. Dec. 478.

[2] Phillips v. Thompson, 2 Johns. Ch. (N. Y.) 418, 7 Am. Dec. 535.

[3] Beale v. Bank, 5 Watts (Pa.) 529; Hanna v. Holton, 78 Pa. St. 334, 21 Am. Dec. 20; Miller v. Gettysburg Bank, 8 Watts (Pa.) 192, 34 Am. Dec. 449; Whitteker v. Charleston Gas Co., 16 W. Va. 717; First Nat. Bank of Wellsburg v. Kimberlands, 16 W. Va. 555.

remainder to his debtor, covenanted expressly "to take proper means" for its collection. The creditor, however, delayed for several months after the maturity of the mortgage to commence proceedings to foreclose it, and then his solicitor delayed for some years, and much longer than was necessary, to bring the case to a hearing and to obtain a decree. In the superior court,[1] Judge Sandford said: "The retainer of a competent solicitor was undoubtedly a proper step to be taken, and, as far as it went, was a compliance with the contract. But the responsibility did not cease there; and if the solicitor failed to pursue the proper means for collecting the securities, the defendant must answer for his default. It was contended that proper means were taken in this case; that the long delay which occurred was the result of no oversight on the part of the solicitor employed; in his judgment, it was inexpedient to proceed under the circumstances; and his course was the true one. The good faith of the solicitor is not impeached. This, however, did not satisfy the covenant; nor did the exercise of his judgment, if that judgment were wrong and caused unreasonable delay. We have considered the question with more than usual care and deliberation, and we can not resist the conclusion that the course pursued by the solicitor was unwise, and, in respect to the defendant's duty to the plaintiff, was entirely unwarrantable." This judgment was affirmed in the court of appeals.[2]

Although this decision was upon a covenant to use proper means to collect the mortgage, it is conceived that there is a covenant just to this effect implied in the taking of a mortgage as collateral security, and that the decision is applicable to such a case.

§ 713a. **What is reasonable diligence in a pledgee in such cases is ordinarily a question for the jury,** though the court may rule that it is not incumbent upon him to resort to the extraordinary remedy of a suit in equity. A bank holding as

[1] Hoard v. Garner, 3 Sandf. (N.Y.) 179, 189.

[2] Hoard v. Garner, 10 N. Y. 261.

security notes secured by a chattel mortgage of live stock and farming implements, is not necessarily negligent in not enforcing the notes as they mature, though the mortgaged property is at that time adequate for the purpose, since, under certain conditions, such as a failure of crops, a prudent creditor would allow the mortgagor some indulgence. In such a case the court should not instruct the jury that it was the duty of the bank to foreclose the mortgage whenever an installment of the debt became due and was not paid, but the jury should have been left at liberty to determine as a matter of fact, and in view of all the circumstances of the case, whether the bank was guilty of negligence in failing to foreclose the mortgage for a period of three years, at the expiration of which the lien of the mortgage under the laws of the state ceased to exist because not renewed within that period, and the security became valueless.[1]

In case the pledgee is by the terms of the pledge authorized to sell or collect the obligation pledged, at his option, the authority to collect the collateral devolves upon him only the ordinary care and diligence of an agent. In a case where the collateral security was a claim in the nature of an account due the pledgor from a private corporation, and before the maturity of the pledgor's note the corporation became disorganized and all its property was transferred to and all its debts assumed by another corporation, so that a suit at law against the corporation which owed the debt was impracticable, it was held that it was not the duty of the pledgee to resort to the extraordinary remedies of a court of equity to reach and subject to payment of the collateral property which had been conveyed to the second corporation.[2]

§ 714. **A pledgee is bound to use reasonable diligence in collecting the interest due on a mortgage** assigned as collateral,

[1] North Western Nat. Bank v. J. Thompson & Sons Manuf. Co., 71 Fed. Rep. 113, 17 C. C. A. 638, 36 U. S. App. 413.

[2] Sampson v. Fox, 109 Ala. 662, 19 So. Rep. 896.

but he is not responsible for the principal as well as for the interest, when the principal has not fallen due, although the mortgage contains a power of sale under which the holder is empowered to sell upon any default in the payment of interest, and in case of such sale the principal is then made due and payable on the day of such sale. Under such a mortgage the principal does not fall due so soon as the interest is in arrear, but only upon a sale for non-payment of interest. The only neglect of which the pledgee is guilty in such case, is neglect to collect the interest. If the pledgee had collected the interest without selling under the power, as cheaply and as speedily as he could have collected it by selling, the pledgor would have no ground of complaint. Moreover, if the pledgee had credited upon the principal debt the interest due upon the collateral mortgage, taking upon himself the hazard of its subsequent collection, the pledgor would have had no ground of complaint.[1] Chief Justice Durfee, delivering the opinion of the court, further said: "It is true she might, the interest being in arrear, have sold under the mortgages, and so made the principal payable, and, according to the testimony, it would have been greatly to the advantage of both herself and the complainant for her to have done so. But in our opinion it was not her duty to do so for any other purpose than to collect the interest, and therefore she is responsible only for the interest which was lost by her neglect. She had a right to suppose that the complainant was willing to let the principal run to its maturity, so long as the interest was paid or accounted for, the complainant having agreed to such a term of credit, the interest being paid. For a like reason, she had a right to suppose that the complainant was satisfied with the sufficiency of the security, as security for the principal, and that, until the maturity of the notes, she was only bound to collect the interest, or to be responsible for it if not collected. It would be exacting too much of a pledgee with power to sell to hold that it is his duty to watch the market, and take advantage of the

[1] Whitin v. Paul, 13 R. I. 40, 43.

most favorable opportunities for selling, or make good any loss resulting from not doing it."

The pledgor's request in such case that the pledgee shall collect the interest, though coupled with the statement that it is the duty of the pledgee, if the interest is not paid, to "enforce the terms of the mortgage," does not make it the pledgee's duty to foreclose for any other purpose than the collection of the interest. If he had wished to have the mortgage foreclosed by sale, to avoid an impending loss by depreciation in the value of the property, he should have said as much. "He could not reasonably expect the pledgee to forecast the future for him." He is not bound to exercise extraordinary care and diligence, and collect the principal without request before it is legally due.[1]

§ 715. **Return of execution unsatisfied.**—The creditor having brought suit upon the collateral obligation within a reasonable time, and prosecuted this to judgment and obtained execution thereon, upon a return of *nulla bona* upon the execution, is not ordinarily bound to do more with the claim; unless it be to prove it in proceedings in bankruptcy or insolvency, if such proceedings be instituted.[2]

§ 716. **The pledgee has no right to compromise with the maker of the collateral note,** and take less than the amount due upon it, unless he has the pledgor's consent.[3] This is certainly the case when the debt is well secured by mortgage.[4] It would only be in an extreme and exceptional case that the pledgee would be justified in making such a compromise. Authority given to a pledgee to sell the collateral note at public or private sale does not authorize him to surrender such note to the maker after maturity, without any effort to collect the same, for a sum less than the amount due thereon, though

[1] Whitin v. Paul, 13 R. I. 40.

[2] Burnett v. Thompson, 1 Ala. 469.

[3] Union Nat. Bank v. Post, 64 Ill. App. 404.

[4] Zimpleman v. Veeder, 98 Ill. 613; Union Trust Co. v. Rigdon, 93 Ill. 458; Garlick v. James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294; Depuy v. Clark, 12 Ind. 427.

this be enough to pay the principal debt. Such a transaction is not a sale of the note but a compromise with the maker, and renders the pledgee liable to the pledgor for the injury the latter has sustained.[1]

One who has taken negotiable paper as collateral security has no right to compromise with the parties liable upon it for a sum less than that called for on the face of the paper;[2] except, perhaps, in a very extreme case;[3] or if he does so compromise, he makes himself accountable for the whole amount of the security. Neither has he any right to surrender the security to the maker upon receiving a sum of money equal to the debt for which the pledge was made, and another note for the remainder of the security; and the pledgor is not obliged to receive the new note, or to await the collection of it by the creditor, but may maintain a suit for the full amount of the original pledge, after deducting the sum for which the pledge was made.[4] If the pledgee delivers up the original note received as security, and takes any other security in place of it, he will be assumed to have received payment in full.[5]

The holder of collateral paper is under no obligation to receive payment thereof in property other than money; and he is not bound to notify the debtor of a proposition to discharge the collateral note in this way.[6]

Even if the debtor requests the creditor to accept a compromise of the collateral security by taking a conveyance of land, although the compromise proposed be a reasonable one under the circumstances, the creditor does not make himself liable for any loss sustained through his refusal to accept a compromise.[7]

[1] Union Trust Co. v. Rigdon, 93 Ill. 458; Foltz v. Hardin, 139 Ill. 405, 28 N. E. Rep. 786.

[2] Garlick v. James, 12 Johns. (N. Y.) 146, 7 Am. Dec. 294; Union Trust Co. v. Rigdon, 93 Ill. 458, 9 Cent. L. J. 486; Grant v. Holden, 1 E. D. Smith (N. Y.) 545; Gage v. Punchard, 6 Daly (N. Y.) 229.

[3] As intimated in Story's Bail., § 214.

[4] Depuy v. Clark, 12 Ind. 427; and see Union Trust Co. v. Rigdon, 93 Ill. 458.

[5] Gage v. Punchard, 6 Daly (N. Y.) 229.

[6] Rives v. M'Losky, 5 Stew. & P. (Ala.) 330.

[7] Rhinelander v. Barrow, 17 Johns. (N. Y.) 538, reversing Barrow v. Rhinelander, 3 Johns. Ch. 614.

A compromise of the collateral note made with the consent of the principal debtor is, of course, binding upon him.[1]

In exceptional cases a compromise without such consent may be sustained; as where the maker of the collateral note is insolvent, and nothing can be collected by process of law, and the compromise effected is, on the whole, advantageous to all parties.[2]

One of two joint debtors gave to their creditor a note and mortgage of a third person for $2,500 as collateral security for the joint debt, which was for $4,200, the other joint debtor having nothing to do with the pledge. The creditor foreclosed the mortgage securing the collateral note, and his attorneys bid off the premises for $2,419, which the creditor repudiated, as the property was not worth that sum. By agreement, however, with the debtor who gave the pledge, the creditor was to hold the property as security until the time of redemption expired, and then sell the property on the best terms he could, and be charged only for the proceeds of such sale. Being unable to sell the property, the debtor who gave the pledge, and the creditor agreed that the latter should retain the property for $1,256 as the sum realized from the collateral. It was held that the debtor who gave the pledge and put up the collateral, had the right to agree with the creditor that he might take it at a reduced amount, and that the other joint debtor, not occupying the position of a surety, could not complain when sued on the note.[3]

§ 717. **A pledgee has no right to surrender a collateral note to the maker without payment.** If he can not collect it, he must return it to the pledgor. If he surrenders it without receiving payment, or makes use of it in any transaction of his own, he is chargeable with its full amount.[4]

But a pledgee who has surrendered the collateral note to the

[1] Pence v. Gale, 20 Minn. 257; Randolph v. Merchants' Nat. Bank, 9 Lea (Tenn.) 63.

[2] Exeter Bank v. Gordon, 8 N. H. 66.

[3] Foltz v. Hardin, 139 Ill. 405, 28 N. E. Rep. 786.

[4] Wood v. Mathews, 73 Mo. 477.

maker of it, without exacting payment, may show in defense that the note was made for the accommodation of the pledgor, or was for some other reason invalid against the maker. The presumption of law is, however, that the note was given for a good and valuable consideration; and unless the pledgee shows that there was a legal defense to the note surrendered, he is liable to the pledgor for the amount thereof, less the debt secured.[1] In such action against the pledgee for having wrongfully disposed of the pledge, he can not show that the pledgor was indebted to the maker of the collateral note both at the time of the pledge and afterwards, for it is not for the pledgee to claim a set-off in behalf of the maker of the note against the pledgor. Neither can the pledgee show that the maker of the collateral note was in the habit of giving his paper to the pledgor as an accommodation, for evidence to this effect does not prove that this particular note was given as accommodation paper.[2]

§ 718. **A creditor holding negotiable paper as collateral security has an undoubted right to exchange the security,** without the consent of the debtor, unless restrained by the express terms of the pledge; and it is only in case loss results to the debtor from want of proper care and diligence in the exchange that the creditor becomes responsible to the debtor for the loss sustained.[3] To make the creditor responsible for a loss arising from an exchange of collaterals, it must be shown that a loss was thereby occasioned to the pledgor. Even a warning given by the latter, that the proposed exchange would result in loss, and that the creditor would make it at his own risk, and would take the exchanged collateral as cash, does

[1] Union Trust Co. v. Rigdon, 93 Ill. 458.

[2] Union Trust Co. v. Rigdon, 93 Ill. 458.

[3] Girard Fire & Marine Ins. Co. v. Marr, 46 Pa. St. 504; Hunter v. Moul, 98 Pa. St. 13, 42 Am. Rep. 610; Randolph v. Merchants' Nat. Bank, 9 Lea (Tenn.) 63; Tompkins County Nat. Bank v. Bunnell & Eno Inv. Co., 8 App. Div. 90, 40 N. Y. Supp. 411; Nelson v. First Nat. Bank, 69 Fed. Rep. 798, 16 C. C. A. 425, 32 U. S. App. 554.

not of itself establish a loss by reason of the exchange, although the substituted collateral turns out to be worthless. There must be evidence that the securities given up were not also worthless. When the pledge has been made on no other terms than those defined by law, the debtor can not afterwards add to or change the conditions of the pledge, so as to turn the collateral note into cash, by a mere notice to the creditor that if he exchanges it for another note he must take the collateral as cash. The pledgor can give such notices and warnings as may raise proof of negligence on the part of the creditor if he disregards them. But this amounts to nothing, unless injury and loss be shown to have resulted from negligence or mismanagement on his part. No doubt the pledgee takes upon himself an increased responsibility by making an exchange of security; but it is only the omission of proper care and diligence on his part that will make him liable to account for collateral security which has proved worthless.[1]

But the creditor is liable for any loss occasioned by an exchange of the collateral obligation without the consent of the debtor, or by the conversion of the collateral into a less security, by discharging any of the parties originally liable upon the collateral.[2] If, for instance, he takes in exchange for a note signed by two persons a new note signed by only one of them, he renders himself accountable to the principal debtor for the original collateral note.[3]

If a pledgee holding a promissory note as collateral security takes in place of it another note as collateral security for the same principal debt, and receives full payment of the debt from this latter note, he can not, subsequently, without the consent of the pledgor, or of his assignee, return the latter collateral note and take back the original collateral note, so as to reinstate the liability of the pledgor, or deprive him or his

[1] Girard Fire & Marine Ins. Co. v. Marr, 46 Pa. St. 504, per Thompson, J.; Griggs v. Day, 21 App. Div. 442, 47 N. Y. Supp. 609; McKusick v. O'Gorman (Minn.), 69 N.W. Rep. 317.

[2] Girard Fire & Marine Ins. Co. v. Marr, 46 Pa. St. 504; Muirhead v. Kirkpatrick, 21 Pa. St. 237.

[3] Muirhead v. Kirkpatrick, 21 Pa. St. 237.

assignee of the right to the surplus of the collateral note which was paid.[1]

There is authority, however, to the effect that if a pledgee exchanges a collateral note for another note, payable to his order, he is bound to account to the pledgor as if the original note had been paid in full, without inquiry whether the exchange had resulted in a loss, or whether the original collateral note was valuable or worthless.[2]

§ 719. **If the creditor extend the time of payment of the collateral note, he thereby makes it his own.**[3] Such is the effect of his receiving payment of part of the collateral note at its maturity, and taking a new note payable at a future day for the part not paid.[4] Even where a creditor does not make a definite agreement for extension, he may, by so dealing with the collateral obligation as to delay the collection of it, make it his own. Thus, if a draft be received by a creditor from his debtor to collect, and to place to the account of the latter when paid, and the creditor presents the draft to the drawee and receives his check for it, but delays for one day to present the check, during which time the drawee fails, the principal debtor is discharged from all liability; for the creditor in such case undertakes to do all that the law requires to be done to obtain payment of the draft, and having failed in that duty to the prejudice of the debtor, he must suffer the consequences.[5]

As regards the maker of the collateral note, an extension of the time of payment by taking a new note payable at a future day, in place of the original note, may have the effect of making a new and valuable consideration for the new note, although the original note was without consideration and sub-

[1] Post v. Union Nat. Bank, 159 Ill. 421, 42 N. E. Rep. 976.

[2] Haas v. Bank of Commerce, 41 Neb. 754, 60 N. W. Rep. 85.

[3] Freeman v. Benedict, 37 Conn. 559.

[4] Nexsen v. Lyell, 5 Hill (N. Y.) 466; Southwick v. Sax, 9 Wend. (N. Y.) 122; Gage v. Punchard, 6 Daly (N. Y.) 229; Depuy v. Clark, 12 Ind. 427; Haas v. Bank of Commerce, 41 Neb. 754, 60 N. W. Rep. 85.

[5] Smith v. Miller, 43 N. Y. 171, 174, 3 Am. Rep. 690.

ject to defense in the hands of the creditor. In such case, the new note being founded on a valuable consideration, independent of that on which the original note was founded, the failure of the consideration of the former is not a defense by the maker in a suit against him on the last note.[1]

[1] Muirhead v. Kirkpatrick, 21 Pa. St. 237.

CHAPTER XVIII.

REMEDIES UPON PLEDGES OF STOCKS.

I. *Sale at Common Law.*

§ 720. **As has already been noticed, a holder of collateral securities, upon the debtor's default, has several remedies.** He may enforce payment of the principal debt; he may sell the collateral securities under any power of sale the debtor may have given, or, in the absence of such power, he may sell them upon giving reasonable notice to the debtor; or he may, by bill in equity, have a judicial sale.[1] The latter course is rendered necessary where stock has been pledged by delivery of a certificate, without any transfer, or power to make a transfer. A court of equity will look upon a transfer as made which ought to be made, and will decree a sale and application of the proceeds to the payment of the loan.[2] There is also jurisdiction in equity in case an account between the parties must be stated, in order to determine the amount of the debt secured,[3] or even in case there is such uncertainty as to the time of payment that a demand of payment will not certainly make the debt due.[4]

[1] Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497.

[2] Johnson v. Dexter, 2 McArthur 530.

[3] §§ 640, 641.

[4] Stokes v. Frazier, 72 Ill. 428.

A transfer of corporate stocks by an indorsement in blank confers upon the pledgee the power to sell them upon default without first having them transferred to his name upon the books of the corporation. His sale will at least pass the title subject only to the rights of the corporation itself, except in states in which the legal title to shares of stock is regarded as being in the holder of the registered title, and where the interest of such holder is subject to attachment in a suit against him so long as he is holder upon the books of the corporation.[1]

§ 721. **The holder of stocks or bonds of a corporation, as collateral, may sell them,** because that is the usual method of turning such securities into money; the sale being made at public auction, after demand of payment and due notice of the sale.[2] Such securities are expressly designed to be circulated and sold in the stock market; and it is to be presumed that, in making a pledge of such securities, the parties contemplate a sale of them in case the debt which they secure is not paid according to agreement.[3]

Interest accruing upon collateral securities may, in the absence of any agreement to the contrary, be properly collected by the pledgee, and applied to the debt secured. Thus, if a bond with interest coupons be the subject of a pledge, an authority in the pledgee to collect the interest as it becomes payable is necessarily implied.[4] A railroad company having

[1] *Ex parte* Sargent, L. R. 17 Eq. 273; France v. Clark, 22 Ch. D. 830; Canfield v. Minneapolis Ag. & Mech. Asso., 4 McCrary 646.

[2] Cortelyou v. Lansing, 2 Caines Cas. (N. Y.) 200; Brown v. Ward, 3 Duer (N. Y.) 660; Washburn v. Pond, 2 Allen (Mass.) 474; Union Cattle Co. v. International Trust Co., 149 Mass. 492, 501, 21 N. E. Rep. 962; Guinzburg v. H. W. Downs Co., 165 Mass. 467, 43 N. E. Rep. 195; Travers v. Leopold, 124 Ill 431, 16 N. E. Rep. 902; and see Fletcher v. Dickinson, 7 Allen (Mass.) 23; Vaupell v. Woodward, 2 Sandf. Ch. (N. Y.) 143; Wallace v. Berdell, 24 Hun (N. Y.) 379; Canfield v. Minneapolis Agricultural & Mechanical Asso., 14 Fed. Rep. 801. That railroad bonds can not be sold, but must be collected, see Joliet Iron & Steel Co. v. Scioto Fire Brick Co., 82 Ill. 548, a decision unsupported in reason or authority, and in conflict with prior decisions of the same court, to which this decision makes no reference. Stokes v. Frazier, 72 Ill. 428.

[3] Morris Canal & Banking Co. v. Lewis, 12 N. J. Eq. 323.

[4] Androscoggin R. Co. v. Auburn Bank, 48 Me. 335.

pledged its own bonds as collateral security, and afterwards, by its agents, having paid the interest coupons as they matured, is precluded by such payment from claiming that cutting off and collecting the coupons operated as a conversion of the bonds.[1]

§ 722. **The remedies of a broker who has purchased stock for a customer on a deposit of a margin are:** 1st. By suit for the purchase-money, after tendering the stock and demanding payment; 2d. By suit for a breach of the contract, wherein the broker would charge himself with the stock purchased and the advance made upon it;[2] 3d. By a public sale of the stock purchased, after proper demand upon the customer, and notice to him of the time and place of sale, followed by suit against the customer for any deficiency there might be.

§ 723. **A custom of brokers to sell at the stock exchange, without the notice required at common law, stocks and bonds deposited as collateral,** is declared to be unreasonable and void.[3] As has already been shown,[4] a purchase of stock by a

[1] Androscoggin R. Co. v. Auburn Bank, 48 Me. 335.

[2] Merriam v. Kellogg, 58 Barb. (N. Y.) 445; Bement v. Smith, 15 Wend. (N. Y.) 493.

[3] § 503; Wheeler v. Newbould, 16 N. Y. 392; Lawrence v. Maxwell, 53 N. Y. 19.

A decision that such a custom is not illegal as between parties familiar with, and dealing on the basis of, such custom, was rendered in the common pleas court of Philadelphia, in the case of Colket v. Ellis, 10 Phila. (Pa.) 375, 379. Mr. Justice Mitchell, after referring to several cases upon the general subject of usages, said: "I think their effect may be summed up to be, that where no statute or principle of public policy intervenes, but a rule of law is a mere privilege which may be waived, there is no reason why the waiver may not be as well by a custom known to, and acquiesced in by, the parties as by an express contract. Without intimating what would be the effect if such a usage as the present were set up against an outside party, I am of opinion that, as between plaintiffs and defendants, both members of the board of brokers, familiar with and dealing on the basis of it, it is a valid and lawful custom, and controls the rights of these parties."

But, aside from the matter of custom, the learned judge was of opinion that, in this case, there was an assent on the part of the customer to the sale at the time it was made, and, moreover, a ratification of it after it was made.

This question was raised, but not decided, in Covell v. Loud, 135 Mass. 41, 16 Cent. L. J. 471, 46 Am. Rep. 446. As in the previous case, there was an assent to the sale by the customer.

[4] §§ 495–500.

broker for a customer, upon a margin, creates the relation of pledgor and pledgee between them. Therefore, in a case in New York, where an offer of testimony was made to show a custom of brokers to sell without notice, the testimony was held to be inadmissible.[1] Chief Justice Hunt, in relation to this part of the case, said: "The broker has no right to sell without notice. A practice or custom to do otherwise would have no more force than a custom to protest notes on the first day of grace, or a custom of brokers not to purchase the shares at all, but to content themselves with a memorandum or entry in their books of the contract made with their customer. Such practice, in each case, would be in hostility to the terms of the contract, an attempt to change its obligation, and would be void. The proof, therefore, can not be legally given." If the broker desires to possess himself of the power to sell the collateral, on failure to repay advances, without notice of time and place of sale, he must make an agreement that shall permit him to do so.[2]

§ 723a. **A broker's customer has equities as against bankers to whom the broker has pledged the customer's stock without the latter's consent.** Prior to May 8, 1884, a person deposited with a firm of brokers in New York city one hundred shares of corporate stock as security for any indebtedness to that firm. On that date the brokers, without the knowledge or consent of the customer, pledged said stock, with other shares of stock belonging to said firm, to bankers as security for a loan. The loan was made subject to the rules of the New York stock exchange, of which the member of each firm who negotiated it was a member. The bankers were *bona fide* pledgees, having no knowledge that the brokers were not the owners of all the stock pledged. The customer was not, in fact, at the time of the pledge equitably indebted to the broker in any sum whatever, and did not thereafter become so indebted. On May 14,

[1] Markham v. Jaudon, 41 N.Y. 235; Smith v. Savin, 141 N. Y. 315, 36 N. E. Rep. 338, 57 N. Y. St. Rep. 417, affirming 69 Hun 311, 23 N.Y. Supp. 568.

[2] Taylor v. Ketchum, 5 Robt. (N.Y.) 507, 513, per Garvin, J.

1884, the brokers failed and made an assignment. The customer on that day learning of that fact, and also then learning for the first time that his stock had been so pledged, notified the bankers of his interest and requested a statement of the amount for which his stock was held. The bankers refused to give any information or to recognize plaintiff's rights. The bankers on the same day, without notice to customer or the brokers, and in violation of the rules of the exchange, sold all the stock so pledged. The customer's stock sold for about $8,000, and after applying the proceeds of all the stock pledged in payment of the loan, there remained about $3,000 in the hands of the bankers. The customer did not learn of the sale of his stock until June 21, 1884, at which time the price of said stock had reached par and the prices of the other stock sold had so advanced that if they had been held and then sold the proceeds would have paid the loan, leaving the customer's stock free from any claim. In an action for conversion it was held that the bankers had no right to apply the balance in their hands upon another debt due them from the brokers; also, that while the bankers, as *bona fide* pledgees, were entitled to regard the brokers as owners of all the stock pledged until notified of the customer's rights, having been so notified prior to the sale, he then stood, with reference to his stock, as surety, with the right to compel them to apply the proceeds of the other stocks before resorting to his stock; that as to his stock, he had the right to require a sale in accordance with the rules of the stock exchange, and could treat the unlawful sale as a conversion, and after the proceeds of the sale of the other stocks had been applied to the payment of the loan, he was entitled to the highest price which his stock reached within a reasonable time after its illegal sale, and to judgment for that sum, deducting therefrom the balance due the bankers after such application; and that as the customer did not learn of the sale until after June 21st, that was a reasonable time; but it was held, in regard to the other stock sold, that the customer was not entitled to charge the bankers with the highest price because of the unlawful sale, and so

long as it sold at its full market value at the time of sale, he could not complain.[1]

§ 724. **The bankruptcy of the pledgor of stock or negotiable bonds of a corporation does not deprive the pledgee of the right to sell** and transfer them, upon the pledgor's default. The right is presumable from the nature of the transaction, even in the absence of any express stipulation in the contract of pledge that the pledgee may sell on default. The Bankruptcy Act takes away no right secured to the pledgee by his contract.[2]

If, in the proof of a promissory note in bankruptcy, the creditor agrees with the assignee in bankruptcy that bonds or stocks held as collateral shall, for the purpose of proof, be credited as of a certain value, or even if the agreement be that the collateral shall be sold at a certain price, for the purpose of fixing the amount provable against the bankrupt's estate, such agreement is not conclusive as against another party to the note that the creditor actually received the amount so credited, or that he made any actual sale of the collateral which such other party was entitled to avail himself of. Whether there was any such sale is a question of fact.[3]

§ 725. **A creditor can not apply collateral security in satisfaction of the debt in any way save by notice and public sale,** or in pursuance of a contract for private sale.[4] A loan was made in 1855 upon certain shares of telegraph stock. In 1863 the debtor offered to pay the debt, and demanded a return of the stock. The creditor replied that he had not expected the stock would ever be redeemed, and had sold his own stock of the same company at a low price, because he did not wish to have so much of it, retaining that which he had received in

[1] Smith v. Savin, 141 N. Y. 315, 36 N. E. Rep. 338, 57 N. Y. St. Rep. 417.

[2] Jerome v. McCarter, 94 U. S. 734; *In re* Grinnell, 9 N. Bank. R. 137.

[3] Globe Nat. Bank v. Ingalls, 130 Mass. 8.

[4] Lewis v. Mott, 36 N. Y. 395; McNeil v. Tenth Nat. Bank, 55 Barb. (N. Y.) 59; Feige v. Burt, 118 Mich. 243, 77 N. W. Rep. 928.

pledge. Inasmuch as he would have lost in case the stock had declined, having nothing else to look to for his claim, he thought it only just that he should have the benefit of a rise in the stock, having taken all the risk himself. But, of course, the court told him that he could not appropriate the stock to the payment of the debt at his own option, but only in the manner the law provides.[1]

§ 726. **The general rules in regard to demand and notice in the case of the sale of an ordinary chattel under a pledge apply to sales of stocks held in pledge.**[2] If the obligation secured be not payable at a fixed time, a demand of payment is necessary before proceeding to give notice of the time and place of sale. Such a demand is necessary to create a default. Thus, a broker carrying stocks upon a margin must demand payment either of the balance of the account, or demand that the margin be made good, in case there be a special contract in regard to the amount of the margin to be kept.

A notice that unless a specified amount of the loans secured be paid, the stock collateral would be "used," does not constitute a demand sufficient to authorize a sale.[3]

The time and place of sale must be reasonable. But a sale in a state other than that where the pledge was made is not necessarily invalid, and if the pledgor is duly notified of such sale and makes no objection to it, he can not afterwards object to the sale on account of the place where it was made.[4]

A sale at auction is not invalid for the reason that only one bidder was present and the stock was sold for less than its value.[5]

[1] Diller v. Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; and see Davis v. Funk, 39 Pa. St. 243, 80 Am. Dec. 519; Sitgreaves v. Farmers & Mechanics' Bank, 49 Pa. St. 359; Conyngham's Appeal, 57 Pa. St. 474.

[2] France v. Clark, 22 Ch. D. 830.

[3] Genet v. Howland, 45 Barb. (N. Y.) 560, 30 How. Pr. 360.

[4] Guinzburg v. H. W. Downs Co., 165 Mass. 467, 43 N. E. Rep. 195.

[5] Guinzburg v. H. W. Downs Co., 165 Mass. 467, 43 N. E. Rep. 195; and see Learned v. Geer, 139 Mass. 31, 29 N. E. Rep. 215; Wing v. Hayford, 124 Mass. 249.

The creditor in selling stock pledged to him as security is bound to exercise good faith and reasonable skill and diligence so as to get the value of the shares.[1]

§ 727. **Corporate bonds and stocks held as collateral securities may be sold, like ordinary pledges,** after the debt secured becomes due, without judicial process and decree of foreclosure, upon giving reasonable notice to the debtor to redeem.[2]

"The coupon bonds of corporations for the payment of money, which have a long time to run, and are made payable to bearer that they may be bought and sold in the market, are property of such a nature that, when pledged as security for the payment of promissory notes having a short time to run, the reasonable inference is that the parties intended that they should be sold as pledged property is usually sold if the notes are not paid when they fall due."[3]

The sale must be at public auction, and the notice must specify the time and place of it.[4] Aside from a sale under

[1] Guinzburg v. H. W. Downs Co., 165 Mass. 467, 43 N. E. Rep. 195; Clark v. Simmons, 150 Mass. 357, 25 N. E. Rep. 108; Schaaf v. Fries, 77 Mo. App. 346. See White v. Board of Assessors, 16 Fed. Rep. 833.

[2] Morris Canal & Banking Co. v. Lewis, 12 N. J. Eq. 323; Indiana & Ill. Cent. R. Co. v. McKernan, 24 Ind. 62; Loud v. Burke, 22 Gratt. (Va.) 254; Water Power Co. v. Brown, 23 Kan. 676, 691; Merchants' Nat. Bank v. Thompson, 133 Mass. 482, 485; Union Cattle Co. v. International Trust Co., 149 Mass. 492, 501, 21 N. E. Rep. 962, citing text; Feige v. Burt, 118 Mich. 243, 77 N. W. Rep. 928; Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. Rep. 646; Alexandria L. & H. R. Co. v. Burke, 22 Gratt. (Va.) 254.

[3] Union Cattle Co. v. International Trust Co., 149 Mass. 492, 501, 21 N. E. Rep. 962, citing text.

[4] Diller v. Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; Conyngham's Appeal, 57 Pa. St. 474; Gay v. Moss, 34 Cal. 125; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497; Brown v. Ward, 3 Duer (N. Y.) 660. Contrary to the better and general rule, it is declared in Worthington v. Tormey, 34 Md. 182, 195, that, in selling stocks, a pledgee is not bound to give notice of the *place* of sale, Grason, J., saying: "In sales of some kinds of pledges, such as heir-looms, plate, and other articles of like character and description, which possess a peculiar value to the owner, or which can not readily be replaced, it is right and necessary to give notice to the bailor of both the time and place of sale, in order that he may have an opportunity of redeeming his pledge, or attending the sale and protecting his interests. But the same reason does not apply to cases of sales of stocks. One share is

judicial process, or one at auction, after proper notice, the holder of such collaterals can appropriate them to the payment of the debt secured only in pursuance of a special contract with the debtor.[1] In the absence of a special agreement as to the time, place, or manner of sale, such collaterals must be sold at public auction, after reasonable notice to the debtor of the time and place of sale.[2]

When a creditor has given proper notice of the sale of the collateral security, the debtor has no alternative but to redeem the security by paying the debt for which it was pledged, or to allow it to be sold. He can not resist the creditor's right to have the stock sold, on the ground that the sale could then be made only at a great sacrifice.[3] The pledgee is under no obligation to wait a better condition of the market or to defer the sale on account of a depressed condition of the money market.[4]

§ 728. **A pledgee of corporate stocks or bonds is under no obligation to sell the security** after default in payment of the debt.[5] Thus, one holding bank shares as collateral security wrote to his debtor requesting payment, and stating that if payment were not made immediately he should sell the shares.

exactly similar to, and of the same value as, another of the same company, and can be purchased easily and readily, if desirable." It is, however, submitted that the reason given is not sufficient to sustain the exception to that rule.

[1] Diller v. Brubaker, 52 Pa. St. 498.

[2] Little v. Barker, Hoff. Ch. (N. Y.) 487; Genet v. Howland, 45 Barb. (N. Y.) 560, 30 How. Pr. 360; Lewis v. Graham, 4 Abb. Pr. (N. Y.) 106; Ogden v. Lathrop, 3 J. & S. (N. Y.) 73; Stokes v. Frazier, 72 Ill. 428; Sitgreaves v. Farmers' & Mechanics' Bank, 49 Pa. St. 359; Strong v. Nat. Mechanics' Bank, 45 N. Y. 718. As to reasonable notice, see Stewart v. Drake, 46 N. Y. 449, holding that a notice given on the afternoon of Thursday, of a sale to be made at half-past twelve o'clock on Saturday, was a timely and reasonable notice, the parties living and being in the city of New York, where the sale was made and all the transactions had.

[3] Rasch v. His Creditors, 1 La. Ann. 31.

[4] Smith v. Lee, 84 Fed. Rep. 557; King v. Texas Banking & Ins. Co., 58 Tex. 669.

[5] Wood's Sons Co. v. Schaefer, 173 Mass. 443, 53 N. E. Rep. 881; Howell v. Dimock, 15 N. Y. App. Div. 102, 44 N. Y. Supp. 271; O'Neill v. Whigham, 87 Pa. St. 394, 7 Reporter 245; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497; Colquitt v. Stultz, 65 Ga. 305; Rozet v. McClellan, 48 Ill. 345, 95 Am. Dec. 551.

The debt was not paid, and the pledgee did not sell the shares. The bank afterwards failed, and the shares became of no value. In an action by the creditor on the debt, it was held that his omission to sell the shares constituted no defense. The pledgee in such case takes upon himself no duty to sell the shares, but simply holds them as security, with perhaps a power to sell. The remedy of the debtor is in paying the debt and redeeming the shares.[1] It does not alter the case that the stock has been transferred on the books of the corporation and a new certificate issued to the pledgee. Though the pledgor can not himself sell the stock in such case, he could, after the maturity of the debt, request the pledgee to sell, and in that way make him liable for a loss occurring through his failure to sell. But without such request, and in the absence of any special agreement upon this matter, it is discretionary with the pledgee after maturity to sell or not as he may deem best. The law imposes no obligation upon him to do anything more than to safely keep the stock so as to restore it when the debtor might redeem.[2]

Where a pledgee, giving a statement to the pledgor of the bonds, stocks and other securities held in security, declared that the proceeds arising from the sale of the securities, and recovered from the choses in action, are to be applied to pay off the notes secured, and the remainder is to be paid to the pledgor subject to the repayment of the pledgee's expenses in prosecuting the claims or selling the securities, it was held that there was no contract on the part of the pledgee to prosecute or to sell, but only a mention of a power to do so. If he did prosecute or sell, the proceeds were to be applied in the way mentioned.[3]

When a creditor has agreed to dispose of collateral stock held in pledge and apply the proceeds to the payment of the

[1] Granite Bank v. Richardson, 7 Met. (Mass.) 407.

[2] Colquitt v. Stultz, 65 Ga. 305.

[3] Culver v. Wilkinson, 145 U. S. 205, 12 S. C. Rep. 832, affirming Wilkinson v. Culver, 33 Fed. Rep. 708.

debt, his neglect to do so is not a bar to an action upon the debt, but is a matter of defense or set-off.[1]

§ 729. **A pledgee of stock is not liable for a loss occasioned by his neglect to sell the stock**—it having depreciated in his hands till it became worthless—when by contract between the parties the right to sell the stock had been conferred upon the pledgee or a third person, and the pledgee has never refused to transfer the stock for the purpose of a sale, and the pledgor has never requested that a sale should be made.[2] The pledgor, having the general property in the pledge, may sell it, and compel its restoration upon paying the debt secured.[3] If he should find a purchaser who should tender the amount of the debt to the pledgee, and the latter should refuse to deliver the stock to him upon the order of the pledgor, the creditor would undoubtedly be liable for a conversion of the stock.

A creditor holding corporate bonds as collateral security is not liable for a depreciation occurring after he has received other collaterals in their place, under an agreement to surrender the bonds, unless the debtor has demanded them. It is the duty of the debtor in such case, if he wants the bonds after he has become entitled to them, to demand their surrender; and, if he allows them to remain in the creditor's hands, they are at his risk, so far as loss may occur from delay in collection or the like cause.[4]

When the pledgee has the right to sell the stock at his dis-

[1] Taggard v. Curtenius, 15 Wend. (N. Y.) 155. The stock in this case was of a bridge company, and the debtor claimed that the creditor neglected to dispose of the stock, according to agreement, until the bridge was carried away by a flood, and its value was thereby greatly lessened.

[2] Howard v. Brigham, 98 Mass. 133; Newsome v. Davis, 133 Mass. 343; Wood's Sons Co. v. Schaefer, 173 Mass. 443, 53 N. E. Rep. 881; O'Neill v. Whigham, 87 Pa. St. 394; Richardson v. Ins. Co., 27 Gratt. (Va.) 749, where the stock pledged was supposed to have become worthless in consequence of the civil war, but the pledgor neither sought to redeem it nor requested the pledgee to sell it; Colquitt v. Stultz. 65 Ga. 305, 22 Alb. L. J. 436; Savannah Bank & Trust Co. v. Hartridge, 73 Ga. 223.

[3] Rozet v. McClellan, 48 Ill. 345.

[4] Williamson v. McClure, 37 Pa. St. 402.

cretion without notice, he is not bound to sell the stock, even at the pledgor's request, immediately upon default. He may in such case exercise his own judgment as to the sale of the stock, subject only to the general liability of a pledgee for negligence.[1] His refusal to sell upon request may, or may not, be negligence. Such a request may tend to prove negligence and may be essential to establish it.[2]

Certainly the creditor is under no obligation to sell the stock immediately upon default. He can hold the stock at his own risk without making sale.[3] Even if the debtor should request the creditor, upon default, to sell the stock, it would seem that such request would be without legal effect; because the debtor, if he desires to sell the stock, should first redeem it, and then he can do with it as he may choose.

II. *Sale Under Powers of Sale.*

§ 730. **In general.**—It is, of course, competent for the parties to agree, by express terms, that upon the pledgor's default, or upon his failure to keep the security good, the pledgee may sell at public or private sale, at his option, without giving notice of his intention, or of the time or place of sale;[4] or upon giving a specified notice of such time and place.[5]

A debtor, though in fact insolvent, may authorize his creditor to sell at private sale stocks held as collateral security. He may even, after his failure, if before the commencement of proceedings in bankruptcy, authorize a sale of collaterals, or acquiesce in a sale made, although at a sacrifice; and his

[1] Franklin Sav. Inst. v. Preetorius, 6 Mo. App. 470.

[2] Goodall v. Richardson, 14 N. H. 567, 572.

[3] O'Neill v. Whigham, 87 Pa. St. 394.

[4] Milliken v. Dehon, 27 N. Y. 364; Chouteau v. Allen, 70 Mo. 290.

[5] Bates v. Wiles, 1 Handy (Ohio) 532; Loomis v. Stave, 72 Ill. 623.

In a few states it is expressly provided by statute that a negotiable instrument may contain a pledge of collateral security, with authority to dispose thereof; as in North Dakota, R. Code 1895, § 4858, and South Dakota, Annot. Stat. 1899, § 5664.

It is held that such a power does not deprive a promissory note of its negotiable character. Fancourt v. Thorne, 9 Q. B. 312.

assignee in bankruptcy subsequently chosen will be bound by such authority or acquiescence.[1]

A power of sale without notice or demand, upon default of payment of an obligation having a definite time of payment, may be exercised immediately upon such default.[2] Under a time-note, giving authority to sell the security on non-performance of the promise, no valid sale of the collateral can be made before the maturity of the principal debt. A sale before maturity is a conversion and not a sale under the power, which is restricted by the terms of the contract to the case of non-performance.[3] But where a note payable in three months was secured by a pledge of stock which the lender agreed to hold for three months, it was held that, inasmuch as there were days of grace upon the note but none upon the agreement for the return of the stock, the stock might be sold under a power before the maturity of the note.[4]

A provision in the contract of pledge that the pledgee may sell the stock taken in pledge before maturity, in case it should depreciate in value, does not warrant a sale before maturity without notice, on the ground that the stock was fraudulently issued.[5]

A contract of pledge which provides that stocks given as security shall be sold upon a certain specified time and in a particular manner precludes any implied authority to sell them before the debt becomes due, or at any other place than that provided for.[6]

§ 731. **A power of sale may be implied from the terms of the pledge.** Thus, drafts drawn upon a person with whom the drawer had deposited city bonds upon scrip, directing him to pay "from the proceeds of securities in his hands," or to

[1] Sparhawk v. Drexel, 12 N. Bank. R. 450.

[2] Chouteau v. Allen, 70 Mo. 290.

[3] Allen v. Dykers, 3 Hill (N. Y.) 593; Dykers v. Allen, 7 Hill 497.

[4] Rankin v. McCullough, 12 Barb. (N. Y.) 103.

[5] National Bank v. Baker, 128 Ill. 533, 21 N. E. Rep. 510, 27 Ill. App. 356, 4 L. R. A. 586; Huiskamp v. West, 47 Fed. Rep. 236.

[6] Dykers v. Allen, 7 Hill 497, 42 Am. Dec. 87; Allen v. Dykers, 3 Hill 594.

pay, "when in funds, from the proceeds," was held to imply authority in the latter to sell the securities to meet the drafts; and a sale under such authority is good without notice to the debtor of the time and place of sale, and without previous demand of payment.[1] Authority to sell at private sale was inferred from a pledge of stock, with authority to the pledgee to sell in case it is not redeemed by a day specified, or to give the same "to any broker to sell that day;" and a sale made by a broker after the day specified, at private sale, for the full market price of the stock, was held to be in conformity with the authority, and valid.[2] This construction is based upon the consideration that the parties by their contract intended to enlarge the power of sale which the law gives to every pledgee, and to enable him to sell at private sale, and without notice. The fact that a sale by a broker was authorized implied a private sale, and the provision that he might sell on the day he received the stock excluded the requirement of any notice.[3]

Where collateral securities have been pledged upon special terms, and afterwards further securities are deposited by way of margin on the original loans, the latter, in the absence of any special agreement, may be regarded as pledged, according to the terms of the written contracts relating to the original securities, under the rule that the accretion follows the main body, and is subject to the same conditions. If by the terms of the original pledge some of the securities might be sold on one day's notice and some on three days' notice, the additional securities may be sold upon the longest term of notice so stipulated for.[4]

§ 732. **Waiver of notice.**—Under a special authority to sell collaterals upon default of payment without notice, or upon demand of payment without further notice, all notice of the time and place of sale, such as the law requires in the absence of a special agreement, is waived. The only obligation

[1] Hyatt v. Argenti, 3 Cal. 151.

[2] Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69.

[3] Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69.

[4] Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 269, 301.

resting upon the creditor in such case is to sell publicly and fairly for the best price he can obtain.[1] But the parties may agree that there may be a private sale without notice, and then the only obligation upon the creditor is to sell fairly for the best price he can reasonably obtain.[2]

Where, by the terms of a contract, a loan is made payable on one day's notice, and the creditor is authorized, upon the debtor's default, to sell the collaterals without further notice, a sale may be made at any time after the expiration of one day from the making of demand of payment.[3]

If stock or bonds be pledged as security, with a right of sale if the indebtedness be not paid within a reasonable time, but the power of sale makes no provision as to the time, place, or manner of sale, a valid sale can not be made without giving the debtor reasonable notice of the time and place of sale. A sale made by the creditor upon the same day that he notifies the debtor that he must pay or satisfactorily secure his indebtedness is made upon an unreasonable notice, and renders the creditor liable in damages.[4]

§ 733. **A minor may revoke his waiver of notice of sale upon coming of age.** Thus, a minor who has bought stocks, and deposited money with his broker for a margin to carry them, may upon coming of age repudiate the transaction, may retract authority given the broker to sell the stocks without notice or demand of payment, and may recover the amount deposited with the broker to cover margins.[5]

§ 734. **When the giving of the notice of sale provided for**

[1] Loomis v. Stave, 72 Ill. 623; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242, 264; Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 269; Bryson v. Rayner, 25 Md. 424, 29 Md. 473.

[2] Genet v. Howland, 45 Barb. (N. Y.) 560; Milliken v. Dehon, 27 N. Y. 364; Hamilton v. State Bank, 22 Iowa 306; Fitzgerald v. Blocher, 32 Ark. 742, 29 Am. Rep. 3; Robinson v. Hurley, 11 Iowa 410, 79 Am. Dec. 497.

[3] See Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242.

[4] Stevens v. Hurlbut Bank, 31 Conn. 146.

[5] Heath v. Mahoney (N. Y. S. C. Rep. 1881), 12 N. Y. Weekly Dig. 404.

in a contract of pledge has been rendered impossible by the act of the pledgor, a valid sale may be made without giving the notice. Thus, a bank having pledged negotiable bonds with power to sell them in case of default on giving the bank thirty days' notice of the intended sale, subsequently failed and closed its place of business, and had no office or acting officers. The pledgee three years afterwards sold the bonds in good faith at their market value, without giving notice to the bank; but he was held not to have incurred thereby any liability for a conversion of the bonds.[1]

§ 735. **As regards the price obtained at a sale made under a power to sell without notice,** the mere fact that the price obtained is less than the market price at the time does not alone make the pledgee liable for the difference. It must appear that there was an intent to injure the pledgor, or that there was such recklessness shown, in the mode or time of selling, that such intent might be inferred.[2]

A pledgee authorized to sell stocks and bonds pledged as collateral security at any broker's board, or at public or private sale, without notice, may sell after the maturity of the debt secured without waiting for a favorable condition of the market.[3]

A pledgee sent the pledged stock to brokers to be sold, with instructions not to sell for less than $7.50 per share,—about the amount due on the note. No bids were made, and it was bought in for the pledgee, who was authorized by the pledgor to purchase, at $1 per share. The maker of the note was insolvent, and the stock had no market value. Though the contract authorized a sale without notice to the pledgor, he was notified of the sale. It was held that it did not appear that

[1] City Bank v. Babcock, 1 Holmes 180.

[2] Durant v. Einstein, 5 Robt. (N.Y.) 423, 35 How. Pr. 223; Jenkins v. Smith, 21 Misc. (N. Y.) 750, 48 N. Y. Supp. 126; Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co., 56 Fed. Rep. 164; Smith v. Lee, 84 Fed. Rep. 557.

[3] Franklin Nat. Bank v. Newcombe, 1 App. Div. 294, 72 N. Y. St. Rep. 596, 37 N. Y. Supp. 271, affirmed, 157 N.Y. 699, 51 N. E. Rep. 1090.

there was bad faith on the part of the pledgee, whereby the stock sold for less than its market value.[1]

The owner of five hundred shares of common stock of a corporation, of the face value of fifty thousand dollars, but which represented no real value in property, and which would draw dividends only after an annual dividend of six per cent. should be paid upon the preferred stock, which was equal to the full value of the company's assets, pledged such shares, with other stocks of the face value of fifty-one thousand dollars, to secure a loan of thirty thousand dollars. The contract of pledge permitted the pledgee, upon a failure to pay the loan when due, to sell the shares without advertisement or notice, at public or private sale. The loan was overdue, and the pledgee had repeatedly, but in vain, demanded payment for more than six weeks, when he sold the five hundred shares of stock at private sale, without notice, for the sum of seven thousand dollars. It was held that the sale was valid, being in compliance with the terms of the contract, and that, considering the uncertain value of the stock, it could not be held void on the ground that the consideration was inadequate.[2]

§ 736. **A demand of payment of the principal debt may be necessary** before a sale of the collateral, although the creditor be authorized to sell without notice upon the debtor's default. Thus, if the debt be one payable upon demand, or at an indefinite time, there can be no default until a demand has been made, or an action has been brought to enforce the claim—the bringing of an action being only one way of making demand;[3] but the creditor in such cases may call upon the debtor

[1] Manning v. Shriver, 79 Md. 41, 28 Atl. Rep. 899.

[2] Carson v. Iowa City Gaslight Co., 80 Iowa 638, 45 N. W. Rep. 1068.

[3] Wilson v. Little, 2 N. Y. 443, per Ruggles, J., 51 Am. Dec. 307. "In every contract of pledge there is a right of redemption on the part of the debtor. But in this case that right was illusory and of no value, if the creditor could instantly, without demand of payment and without notice, sell the thing pledged. We are not required to give the transaction so unreasonable a construction. The borrower agreed that the lender might sell without notice, but not that he might sell without demand of pay-

at any time to redeem.[1] A notice to redeem collateral securities, by payment of the amount loaned, would operate as a regular demand of payment of the debt; but under such a notice a reasonable time to redeem should be allowed. A notice without date or signature, left at the pledgor's office, stating that if a specified amount of the loan be not paid the stock securing it would be "used," does not constitute a demand sufficient to authorize a sale.[2]

Stocks carried upon a margin, under an agreement that a certain margin shall be maintained, can not be sold when the margin has become deficient, without giving notice to the owner that further margin is required, and allowing him reasonable time to make it good.[3] The right to sell arises only upon failure of the owner to make the margin good. There may, however, be an agreement between a broker or banker and customer, by which a right to sell will arise whenever the stocks should fall in price and diminish the margin, without calling upon the customer to make the margin good;[4] but such an agreement is out of the usual course of dealing, and in

ment, which is a different thing." Genet v. Howland, 45 Barb. (N. Y.) 560, 565; Porter v. Parks, 49 N. Y. 564; Sitgreaves v. Farmers' & Mechanics' Bank, 49 Pa. St. 359; France v. Clark, 22 Ch. D. 830.

[1] Sitgreaves v. Farmers' & Mechanics' Bank, 49 Pa. St. 359.

[2] Genet v. Howland, 45 Barb. (N. Y.) 560.

[3] Stenton v. Jerome, 54 N. Y. 480; Baker v. Drake, 66 N. Y. 518, 23 Am. Dec. 80; Hanks v. Drake, 49 Barb. (N. Y.) 186; Ritter v. Cushman, 7 Robt. (N. Y.) 294; Milliken v. Dehon, 27 N. Y. 364; Markham v. Jaudon, 41 N. Y. 235; Stewart v. Drake, 46 N. Y. 449.

Otherwise in *Massachusetts*, where the contract in such case is not regarded as creating the relation of pledgor and pledgee, but as merely executory. Covell v. Loud, 135 Mass. 41, 16 Cent. L. J. 471, 46 Am. Rep. 446. See § 498.

[4] Thus, in Wicks v. Hatch, 6 J. & S. (N. Y.) 95, the stock market being excited, and the customer residing out of town, it was expressly agreed, in writing, that the brokers should sell in their discretion, at public or private sale, without any notice whatever, whenever the margin should fall below five per cent., the stocks having been purchased on a larger margin. Under this agreement it was held that the customer waived all right to notice of deficiency of margin, and that the brokers acquired the right to sell for their own protection, and were only bound to act in good faith and in the exercise of their best judgment and discretion. Affirmed, 62 N. Y. 535.

order to be supported should be definite and certain in the intent that a sale can be made without giving the customer notice to make good the margin.

§ 737. **Sale at brokers' board.**—Whether a sale of corporate stocks, or bonds, or like securities at a brokers' board is such a public sale as the law will sanction, or whether the sale must be made at public auction, is a question upon which there has been some diversity of opinion. In favor of the validity of sales of such collaterals at the brokers' board, it is urged that there is the stock market, to which sellers and buyers of such property resort, and where competition among bidders is most apt to be found; and that such sales are public, and should be supported, unless in particular cases there be some ground for impeaching their fairness.[1]

If the contract of the parties contain no restriction as to the mode or place of sale, and none can be implied from any established custom, and notice of a sale at the brokers' board be duly given to the debtor, his silence in regard to the mode of sale has been held to estop him from afterwards taking objection to it.[2] If a creditor be authorized to sell the collateral security at public or private sale, at his discretion, he may properly sell at the brokers' board; but he is bound to exercise the authority under a trust for the debtor's benefit as well as his own. He has no right to force a sale for barely enough to pay his claim, when he might have obtained a surplus. But he need not, having such a power, sell stocks at auction if there is a fair market for them at the stock exchange or brokers' board.[3]

§ 738. **But, on the other hand, the fact remains, that a sale at the brokers' board is really a private sale.** The regulations

[1] Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242, 265, 89 Am. Dec. 779; Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 269. Question raised, but not decided, in Child v. Hugg, 41 Cal. 519.

[2] Willoughby v. Comstock, 3 Hill (N. Y.) 389.

[3] Sparhawk v. Drexel, 12 N. Bank. R. 450; Castello v. City Bank, 1 N. Y. Leg. Obs. 25, per Hoffman, J.; Wicks v. Hatch, 38 N. Y. Superior Ct. 95.

of the board exclude all but members, and the debtor is not only deprived of the opportunity of seeing that a sale is fairly made, but of the opportunity of arranging to get the best price; and, therefore, the prevailing and better rule is, that, except in case the creditor has specific authority to sell at private sale without notice, a sale at the brokers' board does not answer the requirements of the general law of pledges requiring a sale of the pledge to be at public auction.[1]

§ 739. **Separate lots.** Stock or bonds pledged to a person at different times, to secure several debts, should be sold in separate lots, whether the sale be under order of court or without such order. Each separate debt, in such case, has a separate security; and a sale of all the collaterals in gross, and an application of the proceeds to the entire indebtedness, might, in effect, extend the security to debts unsecured, or secured only in part, and might interfere with the rights of other parties.[2]

But if a debtor deliver several certificates of stock to secure one debt, the creditor is not bound, in selling under a power of sale, to divide either certificate, though representing a large number of shares into small lots, even if a prudent owner having regard solely to his own interests would have done so.[3] The pledgee has no right to sell more of the securities pledged than is necessary to satisfy the debt, if they are susceptible of division; and if he does so, he is responsible for the damage sustained by the debtor. The measure of damages in such case is the sum necessary to replace the securities in excess of what it was necessary to sell, less the price for which the excess was sold, if that has been paid over to the debtor.[4]

[1] Castello v. City Bank, 1 N. Y. Leg. Obs. 25; Brown v. Ward, 3 Duer (N. Y.) 660; Rankin v. McCullough, 12 Barb. (N. Y.) 103, 107, per Edmonds, J.; Brass v. Worth, 40 Barb. (N. Y.) 648, 652; Markham v. Jaudon, 41 N. Y. 235, 244. See Schepeler v. Eisner, 3 Daly (N. Y.) 11, which, however, is not good law.

[2] Mahoney v. Caperton, 15 Cal. 313.

[3] Newsome v. Davis, 133 Mass. 343.

[4] Fitzgerald v. Blocher, 32 Ark. 742, 29 Am. Rep. 3.

§ 740. **A creditor can not himself become the purchaser** of collateral bonds or stocks sold by him upon his debtor's default unless he is expressly authorized to do so by the debtor. Such a purchase does not change the creditor's relation to his debtor as regards the collaterals; but these are still held by the creditor under the original title, as security for the original debt. The debtor, in order to obtain another sale of the collaterals, or to redeem them, is not required to prove that the creditor made a fraudulent sale, or one advantageous to himself, but only that the creditor became the purchaser. The creditor, in selling the collaterals, is in the position of a trustee for the debtor, and the law will not allow of the temptation to fraud, or the possibility of it, through the trustee's becoming purchaser at his own sale.[1]

Objection to the creditor's purchasing does not exist to the same degree when the sale is made upon a decree in equity; for the sale is not then under the control of the creditor, but is made by a disinterested officer designated by the court. Accordingly, authority is very generally given, by statute or by decree, that the creditor may become a purchaser at a judicial sale made for his benefit; or such authority is given by judicial construction.[2]

Where a pledgee is authorized by the pledgor to purchase the pledge in his own right in case of sale, a purchase by the pledgee in his own right is valid as between him and the pledgor.[3]

§ 740a. **But one who is an agent of the pledgee buying bonds sold upon default of the pledgor, acquires a good title** if he

[1] §§ 635–638; Stokes v. Frazier, 72 Ill. 428; Bank of the Old Dominion v. Dubuque & Pacific R. Co., 8 Iowa 277, 74 Am. Dec. 302; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242, 89 Am. Dec. 779; Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 269; Bryson v. Rayner, 25 Md. 424, 90 Am. Dec. 69; Steelman v. Weiskittel, 88 Md. 519, 522, 42 Atl. Rep. 216; Star Fire Ins. Co. v. Palmer, 41 N. Y. Superior Ct. 267; and see Richardson v. Mann, 30 La. Ann. 1060; Wright v. Ross, 36 Cal. 414.

[2] Jones on Mortgages, § 1636; Newport & Cincinnati Bridge Co. v. Douglass, 12 Bush (Ky.) 673, 720.

[3] Manning v. Shriver, 79 Md. 41, 28 Atl. Rep. 899.

purchased for himself in good faith. Thus, one borrowed money and pledged as security for the loan certain bonds, with the right to sell the same at public or private sale upon default without notice. The loan was not paid when due, and the pledgee caused the bonds to be sold by a broker at the stock exchange. They were bought by the pledgee's lawyer, who was not acting for the pledgee in this matter, and bought the bonds for himself. Subsequently the purchaser sold the bonds to the pledgee. When they had appreciated in value the pledgor's assignee filed a bill alleging that the purchaser had bought the bonds as agent or trustee for his client, the pledgee, and that since a pledgee can not purchase at his own sale, the bailment continued, and that plaintiff was entitled to redeem the bonds upon payment of the debt. It was held that these allegations were not sustained by the proof, but that the purchaser bought the bonds in good faith for himself and acquired a valid title, which he was entitled to transfer to the pledgee, who then held the bonds discharged from any right of redemption on the part of the pledgor.[1]

III. *Illegal Sales by the Pledgee.*

§ 741. **The consequences of an illegal sale of stock collaterals** is, that the pledgor may, within a reasonable time afterwards, demand their return, and, upon a tender of the debt, may hold the pledgee liable in damages for failure to return them.[2] But the pledgor can not follow the collaterals in the hands of a purchaser in good faith from the pledgee, without notice that the latter held them in pledge. Before the pledgor can redeem them from the purchaser, or recover them in any way from him, he is required to make the clearest proof of the purchaser's direct knowledge of the loan and pledge.[3]

The consequence is the same if a pledgee himself, or by his

[1] Steelman v. Weiskittel, 88 Md. 519, 42 Atl. Rep. 216.

[2] Blood v. Erie Dime Sav. & L. Co., 164 Pa. St. 95, 30 Atl. Rep. 362.

[3] Little v. Barker, Hoff. Ch. (N. Y.) 487; Felt v. Heye, 23 How. Pr. (N. Y.) 359; Conyngham's Appeal, 57 Pa. St. 474.

agent, purchases collateral stock upon a sale for default. Nothing passes by the sale, and the pledgee holds the pledge by his original title as pledgee. Only a *bona fide* purchaser from him can acquire absolute ownership of the stock.[1]

§ 742. **A wrongful sale or pledge of a customer's stock by a broker does not prevent his recovering for the purchase-money.** Such sale or pledge is a failure to perform a subsequent duty, and he will be liable for the injury done by such failure. It is not a breach of a condition precedent which will prevent his charging his customer for the purchase of the stock.[2]

In an action by a stock-broker to recover an alleged balance on a stock transaction where the broker has sold stock purchased by him on a margin, and held in pledge to secure the advance made by him to make the purchase, he does not, by such sale, as a matter of law, extinguish all claim against the customer for the advance. The stock-broker is liable for the damages sustained by the customer through the wrongful sale of the stock, but whether the damages are equal to, or more or less than the amount of the claim for the purchase of the stocks, depends upon the facts to be developed.[3]

After such illegal or irregular sale the stock still remains in pledge, and all the dividends and accretions to it belong to the pledgor.[4]

§ 743. **A debtor will lose his right to question a sale of his collateral by acquiescence,** or by his failure for an unreasonable length of time to institute proceedings to impeach the sale.[5] The Eliot National Bank, holding certain shares of the Hecla Mining Company, as collateral security for a loan, with

[1] Canfield v. Minneapolis Agricultural & Mechanical Asso., 14 Fed. Rep. 801.

[2] Capron v. Thompson, 86 N. Y. 418, 13 N. Y. Weekly Dig. 199.

[3] Gruman v. Smith, 81 N. Y. 25; and see Capron v. Thompson, 86 N. Y. 418, 13 N. Y. Weekly Dig. 199.

[4] Conyngham's Appeal, 57 Pa. St. 474.

[5] Smith v. Lee, 84 Fed. Rep. 557; Marsh v. Whitmore, 1 Haskell 391, 21 Wall. 178.

written authority to sell at its discretion, notified the debtor that the stock would be sold, and, accordingly, did sell it for more than its market value, to three directors of the bank, and applied the proceeds to the payment of the loan. A statement of account was given to the debtor after the sale, and he was informed of all the material facts respecting the sale, including the fact that the sale was made to three directors of the bank. Three years and a half after the sale, the stock having, in the meantime, greatly increased in value, the debtor notified the bank of his desire to redeem, and filed a bill in equity to assert a right of redemption. The supreme court held, that if he had originally any right to question the sale, he had lost this right by delay in asserting it.[1] An account rendered is regarded as allowed by the party receiving it, unless it is objected to within a reasonable time; and what is a reasonable time depends upon the circumstances of the case, and is for the jury to determine.[2]

Merely leaving the pledge in the pledgee's hands without offering to redeem is not of itself enough to justify submitting to the jury the question of the pledgor's abandonment of it, when the pledgee has ultimately sold the pledge in such a way as to amount to a conversion.[3]

§ 744. **A customer whose stock has been irregularly sold by his broker should make objection to the sale within a reasonable time,** else he may by his silence be estopped from disputing the sale.[4] "What is a reasonable time must depend upon the circumstances of each case. Property of most kinds varies in value but little from week to week; but stocks are sensitive to every breath that blows; not infrequently they fluctuate from day to day, and in times of financial panic the steps in their decline are to be counted by hours, if not by minutes." In illustration of this statement of law, and of the

[1] Hayward v. National Bank, 96 U. S. 611.

[2] Porter v. Patterson, 15 Pa. St. 229; Bevan v. Cullen, 7 Pa. St. 281; Wagner v. Peterson, 83 Pa. St. 238.

[3] Reynolds v. Cridge, 131 Pa. St. 189, 18 Atl. Rep. 1010.

[4] Colket v. Ellis, 10 Phila. (Pa.) 375, per Mitchell, J.

reason for it, the following case is instructive: On the seventeenth day of September, 1873, a firm borrowed of brokers sixteen thousand dollars, payable the next day, on the security of five hundred shares of the stock of the Lehigh Coal and Navigation Company. On the day of the loan the stock was selling at about thirty-five dollars per share. The next morning the failure of Jay Cooke & Co. was announced, and on the next following day the brokers sold, at private sale, with the apparent assent of the borrowers, a part of the stock at twenty dollars per share, and the brokers sold, at the brokers' board, the remainder of the stock at the same price. The same day they rendered an account of sales, showing a balance of four thousand dollars due upon the loan. About a fortnight afterwards they rendered another account, showing the same balance due them. In the month of December following the brokers commenced a suit for the recovery of this balance of account. Early in February following the borrowers tendered the full amount of their debt, and demanded the return of the collateral stock. In the meantime the stock had greatly risen in price until it had reached, at the time of the tender, the price of forty-three dollars per share. It was held that this delay, for about four months, to object to the sale was unreasonable, and that the pledgors were thereby estopped to dispute the sale. Mr. Justice Mitchell, delivering the opinion of the court, said upon this point:[1] "Had plaintiffs promptly objected to the account, and expressed an intention to hold defendants liable for the conversion, the latter might, on the 27th of September, have bought back the stock at the same price at which they had sold it, and avoided this present controversy. How much longer the stock remained at or about this price, the evidence does not show, but this is sufficient to demonstrate the importance of time in the question of ratification. Probably no safer way of speculating at another's risk could be invented than to make default and induce a sale of collaterals on a depressed market, lie quietly

[1] Colket v. Ellis, 10 Phila. (Pa.) 375.

by till the wave had passed and prices were up again, and then tender the amount of the debt, with legal interest. Under the circumstances of this case, the delay of four months in objecting to the sale was so unreasonable, and the condition of defendants had in that time altered so materially, that it would be contrary to common honesty to allow the plaintiffs now to hold the defendants accountable for a loss which was caused in the first instance by their own inability to perform their contract."

§ 745. **The debtor, by accepting the surplus proceeds of a sale, may waive any irregularity in the sale,** and debar himself of the right afterwards to call it in question.[1] Thus, United States bonds having been pledged to a bank to secure overdrafts without any special power of sale, the bank afterwards sold the bonds at private sale with the consent, as the bank claimed, of the debtor. A surplus of proceeds was placed to the credit of the debtor in his account with the bank, entered upon his pass book, and drawn out by him. He afterwards demanded the return of the bonds, and brought suit therefor, denying that he had consented to the sale. Upon the trial of this issue the jury were rightly instructed in substance, that if they found that the sale was made by the consent of the debtor, or that he knowingly accepted the credit on his bank account, then he could not complain that the sale was not made in accordance with the law of pledges, unless he could show that the sale was not fairly made for the fair market value of the bonds.[2]

But a distinction has been made between an acceptance of the surplus by the debtor under a sale which he knew was claimed to have been made with his consent, and an acceptance of surplus arising from a sale made under authority of the act of bailment; the acceptance in the latter case being regarded as no waiver of an irregularity in the sale. The sale being by virtue of the contract, it is said that the acceptance

[1] Wagner v. Peterson, 83 Pa. St. 238.

[2] Hamilton v. State Bank, 22 Iowa 306, per Dillon, J.

or non-acceptance after the sale is no evidence of the legal effect of the contract. The acceptance of the surplus in such case, it is declared, does not estop the debtor, because neither by this act nor by any other had he induced the creditor to make the sale, or had he misled him to suppose he had a right to make the sale.[1]

§ 746. **A pledgor by bringing an action for money had and received against his pledgee, after a wrongful sale of the property pledged, waives the tort** and ratifies the sale. If the property pledged be a bond of the United States, which the pledgee has collected in gold coin at a time when such coin was at a premium, the pledgee is not liable in such action to account for its value in paper currency; but having applied the gold to the payment of the debt, it is to be treated as any other currency, so far as it was applied as current money to the payment of the debt; but that the surplus was to be accounted for at its value in paper money or in gold.[2] If the pledgor, having tendered the amount of the debt before the collection of the bond, had brought an action of trover for the conversion of the bond, the damages would have been the value of the bond after deducting the amount of the debt.[3]

In like manner a debtor's approval of an account and promise to make good a deficiency arising from the sale, made with full knowledge of the facts of the case, are a sufficient ratification of the sale.[4]

§ 747. **A payment of a deficiency arising upon the debt secured, after a wrongful sale of stocks held as collateral security,** might, under ordinary circumstances, be an acquiescence in the sale; but it does not have this effect if it be made for the sole purpose of releasing other securities held in pledge by the creditor, and he refuses to surrender this without such payment. Such a payment is not a voluntary one. Being

[1] Fitzgerald v. Blocher, 32 Ark. 742, 29 Am. Rep. 3.

[2] Hancock v. Franklin Ins. Co., 114 Mass. 155.

[3] Per Morton, J., in Hancock v. Franklin Ins. Co., 114 Mass. 155.

[4] Child v. Hugg, 41 Cal. 519.

procured by a duress of goods, it is no more voluntary in the eye of the law than it would be if procured by duress of the person.[1]

§ 748. **An action of trover can not be maintained by the pledgor to recover the value of stock wrongfully sold by the pledgee without a tender** of the debt secured. The wrongful sale of the pledge does not revest the immediate right of possession of the pledge in the pledgor, and therefore the latter can not maintain the action either for the whole value of the shares or for nominal damages.[2] "It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act to revest in the pledgor the immediate interest or right in the pledge, which, by the bargain, is out of the pledgor and in the pledgee. Therefore, for any such wrong an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for that right clearly is not in the plaintiff."[3]

But in case the pledgee has put the securities beyond his reach by an illegal sale of them, it is said that the pledgor need

[1] Stenton v. Jerome, 54 N. Y. 480; Sharpe v. National Bank, 87 Ala. 644, 7 So. Rep. 106.

[2] Halliday v. Holgate, L. R. 3 Ex. 299; §§ 420-570; Donald v. Suckling, L. R. 1 Q. B. 585; Lewis v. Mott, 36 N. Y. 395; Talty v. Freedmen's Sav. & Trust Co., 93 U. S. 321; Cumnock v. Institution for Savings, 142 Mass. 342, 7 N. E. Rep. 869; Shaver v. Hardin, 82 Iowa 378, 48 N. W. Rep. 68; Feige v. Burt, 118 Mich. 243, 77 N. W Rep. 928; Reardon v. Patterson, 19 Mont. 231, 234, 47 Pac. Rep. 956.

[3] Halliday v. Holgate, L. R. 3 Ex. 299, per Willes, J.

not make a formal tender of the amount due, nor a demand for the securities, before bringing an action against the pledgee to redeem, or an action for the conversion of the securities.[1] If the pledgee by a sale has put it out of his power to return the securities, a formal tender of the debt and a demand for the return of the securities would be a useless ceremony, which the law never requires.[2] If, however, he has only pledged the securities in good faith, and therefore had not wholly put it out of his power to restore them, a demand would be necessary before bringing a suit for damages.[3]

§ 749. **That a debtor must pay or tender the amount of the debt before he is entitled to a re-transfer** of stock held by the creditor as collateral security, is a proposition that is too clear to need authority for its support. But a transaction may be so uncertain in its character as to require a decision of court to determine whether the debtor is to first pay his debt or the creditor is first to tender the stock. Thus, the purchaser of shares of a railroad company gave his note for the purchase-money, and the seller gave him an agreement wherein he agreed to deliver certain certificates of stock, and recited that the stock had been transferred to the purchaser, but that the seller was to hold it for the payment of said note. In an action upon the note, it was held that the transaction was a sale of the stock and a pledge of it for the purchase-money, and not an executory agreement to sell it; and that therefore the

[1] Cortelyou v. Lansing, 2 Caines Cas. (N. Y.) 200, 203; Kilpatrick v. Dean, 19 N. Y. St. Rep. 837, 3 N. Y. Supp. 60; Wilson v. Little, 2 N. Y. 443, 449, 51 Am. Dec. 307; Read v. Lambert, 10 Abb. Pr. N. S. (N. Y.) 428; Lewis v. Graham, 4 Abb. Pr. (N. Y.) 106; Sheridan v. Presas, 18 Misc. (N. Y.) 180, 41 N. Y. Supp. 451; New York, Lake E. & W. R. Co. v. Davies, 38 Hun (N. Y.) 477; First Nat. Bank v. Rush, 85 Fed. Rep. 539, 56 U. S. App. 556; Reardon v. Patterson, 19 Mont. 231, 47 Pac. Rep. 956; Lacombe v. Forstall, 123 U. S. 562, 8 S. C. Rep. 247; Fletcher v. Dickinson, 7 Allen (Mass.) 23; Waring v. Gaskill, 95 Ga. 731, 22 S. E. Rep. 659; Work v. Bennett, 70 Pa. St. 484; Feige v. Burt, 118 Mich. 243, 77 N. W. Rep. 928; Walley v. Deseret Nat. Bank, 14 Utah 305, 47 Pac. Rep. 147.

[2] Fletcher v. Dickinson, 7 Allen (Mass.) 23; Read v. Lambert, 10 Abb. Pr. N. S. (N. Y.) 428.

[3] Read v. Lambert, 10 Abb. Pr. N. S. (N. Y.) 428.

plaintiff was not bound to tender the stock, or to make a formal transfer of it upon the books of the company, until the defendant should have paid the note, or, at least, have tendered payment thereof to the plaintiff.[1]

§ 749a. **A pledgee is not liable for a loss by depreciation in stock pledged occasioned by his delay in returning it, if the pledgor has not tendered payment.** Where a pledgee of shares of stock mislaid the securities and the note secured, so that at the maturity of the note neither this nor the securities could be found, and it was fifteen months after the maturity of the note that this and the certificates of stock were found by the pledgee, when the pledgor discharged his debt and received back the stock from the pledgee, it was held that the pledgor had no legal cause of action for a loss by reason of the depreciation of the value of the stock, the pledgor not having made any tender of the amount of his debt at the maturity of the note or at any time prior to the finding of the certificates and their return to the pledgor, although the pledgor alleged that at the time of the maturity of the note he had made a contract of sale of the stock, and was then ready and willing to pay the debt for which it was pledged, and that his loss in the depreciation of the stock was caused solely by the pledgee's neglect to keep safely the stock pledged as collateral security. The stock pledged was, on the payment of the debt, restored to the pledgor. The latter could have stood upon his rights, and, having paid or tendered payment of the debt at maturity, on the pledgee's neglect or refusal to deliver the stock, could have brought his action for the value.[2]

[1] James v. Hamilton, 2 Hun (N.Y.) 630, 5 T. & C. 183, affirmed 63 N. Y. 616.

[2] Cumnock v. Institution for Savings, 142 Mass. 342, 7 N.E. Rep. 869.

IV. *The Measure of Damages for an Illegal Sale of Stock Collaterals.*

§ 750. **The general rule of damages in actions at law for wrongful conversion of stock by a pledgee** is the value of the stock at the time of its conversion, with interest.[1] This rule follows the general rule, that in an action on a contract to deliver goods, stocks, and other personal property, the measure of damages is the value of the property at the time and place of delivery.[2] "In trover, the general rule, both in England and the United States, undoubtedly is, that the current or market value of property at the time of conversion, with interest from that time until the trial, is the true measure of damages."[3] In many of the cases above cited the doctrine

[1] As in *New Hampshire:* Pinkerton v. Manchester & Lawrence R. Co., 42 N. H. 424, 457; Rand v. White Mountains R. Co., 40 N. H. 79; Frothingham v. Morse, 45 N. H. 545.

Alabama: Terry v. Birmingham Nat. Bank, 93 Ala. 519, 9 So. Rep. 299; Burks v. Hubbard, 69 Ala. 379, 384; Linam v. Reeves, 68 Ala. 89.

Connecticut: Seymour v. Ives, 46 Conn. 109.

Georgia: Waring v. Gaskill, 95 Ga. 731, 22 S. E. Rep. 659.

Illinois: Brewster v. Van Liew, 119 Ill. 554, 8 N. W. Rep. 842, 59 Am. Rep. 823; Loomis v. Stave, 72 Ill. 623; Sturges v. Keith, 57 Ill. 451, Sedgwick's Lead. Cas. on Damages 606, 11 Am. Rep. 28.

Iowa: Robinson v. Hurley, 11 Iowa 410; and see Safely v. Gilmore, 21 Iowa 588.

Maine: Freeman v. Harwood, 49 Me. 195.

Maryland: Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 242, 307, per Bartol, J.; Baltimore City Passenger R. Co. v. Sewell, 35 Md. 238.

Massachusetts: Fowle v. Ward, 113 Mass. 548, per Ames, J.; Gray v. Portland Bank, 3 Mass. 364; Kennedy v. Whirwell, 4 Pick. 466; Greenfield Bank v. Leavitt, 17 Pick. 1; Wyman v. American Powder Co., 8 Cush. 168; Washburn v. Pond, 2 Allen 474.

Mississippi: Bicknell v. Colton, 41 Miss. 368.

Montana: Reardon v. Patterson, 19 Mont. 231, 234, 47 Pac. Rep. 956.

Nevada: Boylan v. Huguet, 8 Nev. 345; and see Carlyon v. Lannan, 4 Nev. 156; O'Meara v. N. A. Mining Co., 2 Nev. 113.

Pennsylvania: Jamison's Est., 163 Pa. St. 143, 29 Atl. Rep. 1001; Blood v. Erie Dime Sav. & L. Co., 164 Pa. St. 95, 30 Atl. Rep. 362; Neiler v. Kelley, 69 Pa. St. 403.

Vermont: Hill v. Smith, 32 Vt. 433.

Virginia: Orange & Alexandria R. Co. v. Fulvey, 17 Gratt. 366.

[2] Sedgwick on Damages, p. 474 *et seq.;* Field on Damages, § 245.

[3] Suydam v. Jenkins, 3 Sandf. (N. Y.) 614, 626, per Duer, J.

noticed in a succeeding section as an exception to this general rule of damages, when the subject-matter of the action is a conversion of stock or goods pledged, or a failure to deliver them after the price has been paid, is expressly examined and repudiated.

§ 751. **In many cases the time of conversion will be fixed by the demand for the return of the stock,** and therefore in such cases the value of the stock will be taken at the time of the demand in fixing the measure of damages.[1] If the time of conversion was not known to the plaintiff at the time it occurred, it is said that he may at his election take the time of its becoming known to him, instead of the time of the actual conversion, as the time for fixing the market value of the stock.[2]

§ 752. **But in a suit in equity to redeem shares pledged as collateral security and wrongfully sold** by the pledgee, the latter may be charged with the value of the shares at the time of filing the bill. "If the sale was unlawful and void as against the plaintiff," say the supreme court of Massachusetts,[3] "he is entitled to all the advantages that he could have had from the shares if they had not been sold at all. Among those advantages is the right of judging for himself whether to keep or to sell them, and as to the best time to sell, if he should see fit to sell them. To place him substantially in the same position as if the wrongful act of the defendant had not occurred, would require that he should recover for damages a sum of money which would enable him to purchase new shares to replace those which have been taken from him, with such additional sum as would indemnify him for the dividends which he has lost since the sale, and also an equitable allowance for interest. It is in vain for the defendant to insist that when he made the sale he obtained the full market price of that time. The

[1] Baltimore City Passenger R. Co. v. Sewell, 35 Md. 238, 257; Pinkerton v. Manchester & Lawrence R. Co., 42 N. H. 424, 457.

[2] O'Meara v. N. A. Mining Co., 2 Nev. 113.

[3] Fowle v. Ward, 113 Mass. 548; 18 Am. Rep. 534.

plaintiff was not a party to that sale, and was not bound by it. The defendant had no right to make the sale. All that he could lawfully do was to hold the shares, and have them forthcoming for the true owner on demand. But instead of so doing, he by his own fault has caused the plaintiff to lose them, and the only equitable remedy is to replace them, or to enable the plaintiff to do so for himself. In the common law action of trover, the rule of damages is undoubtedly the value of the chattel in controversy at the time of the conversion. So also in an action for the non-fulfillment of a contract to deliver stock, the measure of damages would ordinarily be the value at the time when it should have been delivered, or if no time of delivery had been named in the contract the time when it was demanded. But in the case before us the plaintiff seeks, and is entitled to have, the specific equitable remedy of being replaced in his original position. His claim is not damages for breach of a contract or for a wrongful conversion of property, but to compel the reconveyance of shares which ought to be in the defendant's hands at this moment."

§ 753. **In England, and in some of the American states, an exception to this general rule of damages is made** in cases of loans of goods or stock; in cases of contracts to deliver them where the price has been paid; and in cases of failure to return such property when it has been pledged, and the debt secured has been paid.[1] The distinction rests upon the ground that

[1] West v. Pritchard, 19 Conn. 212. The court, after stating the general rule that the damages for a breach of contract to deliver any article is the value of it at the place and time of delivery, say: "But to this general rule an exception has been made in many of the modern cases. And that is, where the price of the goods is paid in advance, and the vendor subsequently refuses to deliver them, the purchaser is not confined to their value at the time when they should have been delivered, but if the goods have risen in value, he may recover their value at the time of trial. But this exception does not apply where a contract is made for the purchase of goods which are to be paid for when delivered. There, as nothing is paid by the purchaser upon the contract, he has the money in his possession, and may, immediately after the contract is broken by the defendant, purchase other goods; and if he sustains any loss by neglecting to do so, the

the defendant having got the plaintiff's money, and thereby having deprived him of the means of going into the market and purchasing the same property at the market prices then prevailing, the plaintiff should be allowed to elect the value at the time the property should have been delivered, or the value at the time of trial, or, perhaps, the value at any intermediate period. Thus, in Shepherd v. Johnson,[1] in an action for breach of an engagement to replace borrowed stock on a given day, the highest value as it stood at the time of trial was taken as the measure of damages, Grose, J., saying: "The true measure of damages is that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglect to replace the stock at the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of the trial. And it is no answer to say that the defendant may be prejudiced by the plaintiff's delaying to bring his action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards, so as to avail himself of a rising market."

§ 754. **This exception had its origin in England in actions for stock loaned, or purchased and paid for.** Stocks are subject to wide fluctuations in price, and in case the market price had advanced between the time of the breach of the contract

fault is his own. He can not avail himself of any subsequent rise of the articles in his action for their non-delivery. * * * Although the exception to the rule seems not to have been universally adopted, yet, in our opinion, it appears to be founded upon principles of natural justice. The effect is to give indemnity to the injured party, who has been induced to part with his property, relying upon the engagements of another." See, also, in recognition of this exception to the rule, Shepherd v. Hampton, 3 Wheat. 200, 204, per Marshall, C. J.; Clark v. Pinney, 7 Cow. (N. Y.) 681; Arnold v. Suffolk Bank, 27 Barb. (N. Y.) 424; Kent v. Ginter, 23 Ind. 1; Randon v. Barton, 4 Tex. 289; Stephenson v. Price, 30 Tex. 715.

[1] 2 East 211; followed in M'Arthur v. Seaforth, 2 Taunt. 257; Greening v. Wilkinson, 1 C. & P. 625; Gainsford v. Carroll, 2 B. & C. 624; Downes v. Back, 1 Starkie 318; Harrison v. Harrison, 1 C. & P. 412; Archer v. Williams, 2 Car. & Kir. 26; Owen v. Routh, 14 C. B. 327; West v. Wentworth, 3 Cow. (N. Y.) 82; Clark v. Pinney, 7 Cow. (N. Y.) 681.

and the trial, it was assumed that the plaintiff could be completely indemnified only by allowing him the value of the stock at the time of trial, or the highest value, up to that time, as damages. But this rule presupposes that the stock was intended for a permanent investment, and that the plaintiff would have kept it until the time of trial. These presumptions may be, and often are, against the fact. The plaintiff, moreover, by being allowed to elect the time at which the stock shall be valued, is able to make the measure of damages depend upon his own strategy rather than upon any fixed or definite rule. "Stocks that cost the owner little or nothing now and then, advance to par, and above. Suppose the owner of such stocks should pledge them when not worth ten cents on the dollar, and the pledgee convert them. They cost the owner little or nothing. Circumstances arise, however, which enhance their value. By delaying his suit, or the trial of it, until these circumstances have had their full effect, the plaintiff, by invoking the aid of the presumptions, 1st, that he had parted with his money for the stock; 2d, that he obtained the stock as a permanent investment; and, 3d, that it is to be presumed that he would have kept it until the time of the trial, can elect to take the market value at the time of trial, when each of these presumptions is as baseless as the fabric of a dream. Such a rule, instead of being general, fixed, and certain, is merely speculative, conjectural, and dependent upon accidental circumstances."[1]

The condition of one who has pledged stock for less than its value, in an action for its conversion by the pledgee, is analogous to the case of a purchaser of stock who has advanced his purchase-money, and has brought suit for failure of the vendor to deliver it; and therefore the same rule of damages is adopted by courts that have adopted the foregoing exception to the general rule.

[1] Sturges v. Keith, 57 Ill. 451, 462, 11 Am. Rep. 28, Sedgwick's Lead. Cas. on Damages, 606. For an able discussion of this exceptional rule of damages, and criticisms upon it, see 2 Sedgwick on Damages, p. 462, marginal note.

§ 755. **The highest market value of the converted stock up to the time of trial** has been taken in some courts as the measure of damages for the conversion, provided the suit is brought without unreasonable delay.[1] The object sought to be attained by this rule seems to be to place the plaintiff in the same situation he would have been in except for the wrongful conversion of his stock. This rule proceeds upon the assumption that the plaintiff would have retained his stock till the day of trial, or till it had reached its highest price prior to that day, and then would have sold it, and hence that its price at that time would be the proper indemnity for him. The courts of New York at one time adopted this rule in regard to stocks, following the rule of damages adopted in that state in relation to other property. But, on the other hand, the courts of Pennsylvania, while rejecting this rule in regard to other property, adopt it in reference to stocks.[2] "The case of stock," say the supreme court of Pennsylvania, "is an exception to the general rule applicable to chattels.[3] It is made an exception in

[1] This is the rule in *England:* France v. Gaudet, L. R. 6 Q. B. 199; Owen v. Routh, 14 C. B. 327; Cud v. Rutter, 1 P. Wms. 570, 572, note. *New York:* Markham v. Jaudon, 41 N. Y. 235; Romaine v. Van Allen, 26 N. Y. 309; Kortright v. Commercial Bank of Buffalo, 20 Wend. 91, per Verplanck, Senator; Wilson v. Little, 1 Sandf. 351; Allen v. Dykers, 3 Hill 593, affirmed 7 Hill 497; and see Lobdell v. Stowell, 51 N. Y. 70, affirming the principle of these cases. See later decisions, §§ 756, 756a, 756b. *Ohio:* Bates v. Wiles, 1 Handy 532.

[2] In regard to this distinction, Mr. Sedgwick, in his work on Damages, p. 273, says: "There appears no solid reason for making any difference between stock and any other vendible commodity. Where stock is loaned, or the price of the article paid for, in either case the party entitled to the delivery parts with his property on the faith of the contract, and in either case is prevented from using it, up to the time of trial. The question is, whether, in either case, the law should act on the assumption that the plaintiff would have retained the property if the contract had been complied with, till the period of highest value, and have realized that price, and thus give damages which are purely conjectural."

[3] Bank of Montgomery v. Reese, 26 Pa. St. 143; and see Conyngham's Appeal, 57 Pa. St. 474; Musgrave v. Beckendorff, 53 Pa. St. 310. But the principle of these cases applies only where the plaintiff suffers loss in the advance price of the stock through the defendant's refusal to perform his contract. Phillip's Appeal, 68 Pa. St. 130.

obedience to the paramount obligation to indemnify the party for his loss. The rule of convenience gives place to the rule of justice. The moment we proceed, on this ground, to take it out of the general rule, we are obliged to substitute one that will do complete justice to the party injured. 'The question is, what did the plaintiff lose?"[1] He is entitled to all the advantages he could have derived from the stock, if it had been delivered at the specified time.[2] Those advantages are the highest market value between the breach and the trial, together with the bonus and dividends which have been received in the meantime.'"[3] In a later case,[4] Judge Sharswood, of the same court, after stating the general rule as to the measure of damages to be that the goods are to be valued at the time of the conversion, that this rule has been modified as to stocks, bonds, and securities of a like nature, says: "The rule, however, is not changed but only modified to this extent, that wherever there is a duty or obligation devolved upon a defendant to deliver such stocks or securities at a particular time, and that duty or obligation has not been fulfilled, then the plaintiff is entitled to recover the highest price in the market between that time and the time of the trial. The grounds of this exception are, that such securities are limited in quantity, are not always to be obtained at any price, and are of a very fluctuating value."

This rule has since been restricted in Pennsylvania to cases in which a trust relation exists between the parties,[5] "a relation which would probably be deemed to exist between a stock broker and his client."

§ 756. **But the better opinion is that this rule of damages is applicable only in special exceptional cases;**[6] and it seems clear

[1] Kimmel v. Stoner, 18 Pa. St. 155, 157.

[2] Harrison v. Harrison, 1 C. & P. 412.

[3] Vaughan v. Wood, 1 Mylne & K. 403.

[4] Neiler v. Kelley, 69 Pa. St. 403.

[5] Huntingdon & Broad Top R. & Coal Co. v. English, 86 Pa. St. 247; Wilson v. Whitaker, 49 Pa. St. 114.

[6] Suydam v. Jenkins, 3 Sandf. (N. Y.) 614, per Duer, J., who ably reviews the whole subject, though the case did not relate to a conversion of stocks; Matthews v. Coe, 49 N. Y. 57,

that it can not be properly applied to a conversion of stocks not held as an investment but carried upon a margin, with a view to making a profit by their sale. In a case of the latter kind, the proper rule of damages is the price the plaintiff would have been obliged to pay in the market to replace the stocks on a day within a reasonable time after the wrongful sale. In Baker v. Drake,[1] this rule was established by the New York Court of Appeals. "If the broker has violated his contract, or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done. But the rule adopted in Markham v. Jaudon,[2] passing far beyond the scope of a reasonable indemnity to the customer whose stocks have been improperly sold, places him in a position incomparably superior to that of which he was deprived. It leaves him, with his venture out, for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end. The more crowded the calendar, and the more new trials granted in the action, the better for him. He is freed from the trouble of keeping his margins good, and relieved of all apprehension of

62. In the latter case Chief Justice Church said: "An unqualified rule, giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial, I am persuaded can not be upheld upon any sound principle of reason or justice. Nor does the qualification suggested in some of the opinions, that the action must be commenced within a reasonable time and prosecuted with reasonable diligence, relieve it of its objectionable character." See, also, Bryan v. Baldwin, 52 N. Y. 232, 236.

[1] 53 N. Y. 211, 217, 13 Am. Rep. 507; affirmed in same case again before the court, 66 N. Y. 518; and see Scott v. Rogers, 31 N. Y. 676; Matthews v. Coe, 49 N. Y. 57, per Church, C. J.; Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Brass v. Worth, 40 Barb. (N. Y.) 648.

The rule laid down in Baker v. Drake, 53 N. Y. 211, has since been affirmed in Gruman v. Smith, 81 N. Y. 25; Colt v. Owens, 90 N. Y. 368. In the last named case thirty days after sale and notice of it was regarded as a reasonable time. Wright v. Bank of Metropolis, 110 N. Y. 237, 18 N. E. Rep. 79, is stated at length in the next section.

[2] See § 755.

being sold out for want of margin. If the stock fall or become worthless he can incur no loss; but if at any period, during the months or years occupied in the litigation, the market price of the stock happens to shoot up, though it be but for a moment, he can at the trial take a retrospect, and seize upon that happy instant as the opportunity for profit of which he was deprived by his transgressing broker, and compel him to replace with solid funds this imaginary loss."

A similar qualification of the rule allowing the highest intermediate value has been made in California. "The time of the commencement of the action or trial," say the court,[1] "would not seem to have any natural or logical connection or relation to the question of damages; and the question as to whether a suit was or was not commenced within a reasonable time would rarely, if ever, depend upon any fact which would affect the indemnity to which the plaintiff is entitled. The reasonable time mentioned in the cases can not mean a reasonable time within which to commence the action independently of the question of damages. It must mean a time within which it would be reasonable to allow the plaintiff to take the highest market price as the measure of his damages. In other words, the rule reducible from the authorities is, that in cases affecting property of a fluctuating value, where exemplary damages are not allowed, the correct measure of damages is the highest market value within a reasonable time after the property was taken, with interest computed from the time such value was estimated."

§ 756a. **The rule of damages in such cases was further modified and finally settled in New York in Wright v. Bank of the Metropolis.**[2] It was then decided that: "Where a pledgee of corporate stock, acting in good faith and under an honest mistake, converts it by an unauthorized sale thereof and refuses to replace it on demand, it is the duty of the owner himself to

[1] Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462, Sedgwick's Lead. Cas. on Damages, 597.

[2] 110 N. Y. 237, 18 N. E. Rep. 79, 1 L. R. A. 289.

replace it within a reasonable time after notice of sale, and the proper measure of damages for the conversion is the highest market price during such reasonable time. The rule in this respect is the same, whether the pledgee is a broker, who purchased and was carrying the stock on a margin for a customer, or whether the owner had paid in full for the same, and was holding it as an investment. As to what is a reasonable time, is, where the facts are undisputed, a question of law for the court." Peckham, J., delivering the opinion of the court, said: "A rule which requires a repurchase of the stock in a reasonable time, does away with all questions as to the highest price before the commencement of the suit, or whether it was commenced in a reasonable time or prosecuted with reasonable diligence, leaves out of view any question as to the presumption that plaintiff would have kept his stock down to the time when it sold at the highest mark before the day of trial, and would then have sold it, even though he had owned it for an investment. Such a presumption is not only of quite a shadowy and vague nature, but is also, as it would seem, entirely inconsistent with the fact that he was holding the stock as an investment. If kept for an investment, it would have been kept down to the day of trial, and the price at that time there might be some degree of propriety in awarding, under certain circumstances, if it were higher than when it was converted. But to presume, in favor of an investor, that he would have held his stock during all of a period of possible depression, and would have realized upon it when it reached the highest figure, is to indulge in a presumption which, it is safe to say, would not be based on fact once in a hundred times. To formulate a legal liability based upon such presumption, I think is wholly unjust in such a case as the present. Justice and fair dealing are both more apt to be promoted by adhering to the rule, which imposes the duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming, of course, in all cases, that there was good faith on the part of the defendant.'"[1]

[1] The rule established in this case Griggs v. Day, 158 N. Y. 1, 52 N. E. has been affirmed in later cases. Rep. 692, reversing same case, 21

§ 756b. **The supreme court of the United States has adopted as the measure of damages in such cases the New York rule,** that is, the highest market value between the time of conversion and a reasonable time after notice of the conversion within which to replace the securities. Mr. Justice Bradley, delivering the opinion of the court, after saying that more transactions of this kind arise in New York than in all other parts of the country, concluded with the statement that "on the whole it seems to us that the New York rule, as finally settled by the court of appeals, has the most reasons in its favor, and we adopt it as a correct view of the law." In the course of his opinion the learned judge states the reason why the ordinary rule of damages for a conversion that is the value of the property at the time of the conversion does not apply in the case of a wrongful conversion of stocks, saying: "To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy and, in the case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence, with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust."[1]

This rule has also been adopted in New Jersey,[2] and by reason of its justice, and of the authority by which it is established it is likely to be adopted throughout the country.

App. Div. 442, 47 N. Y. Supp. 609; Smith v. Savin, 141 N. Y. 315, 36 N. E. Rep. 338, 57 N. Y. St. Rep. 417, affirming 69 Hun 311, 23 N. Y. Supp. 568, 53 N. Y. St. Rep. 378.

[1] Galigher v. Jones, 129 U. S. 193, 200, 9 S. C. Rep. 335.

[2] Dimock v. United States Nat. Bank, 55 N. J. L. 296, 25 Atl. Rep. 926.

§ 756c. **In the absence of any evidence of value of corporate stock converted by a pledge in good faith** and under an honest mistake, it is to be inferred that it was of but little or no value. To entitle the pledgor to recover he should produce evidence of the value of the stock as of a reasonable time after its conversion and notice of this to the pledgor or owner. If the owner fails to show that the stock had a value during that period, he is not entitled to recover.[1]

§ 757. **The true measure of damages** for a broker's unauthorized sale of his customer's stock is the difference between the price for which the stock was sold and its market price within such reasonable time after notice of the wrongful sale as would enable the customer to replace the stock, in case such market price should exceed the price for which the sale was made. The customer is entitled to the damages sustained, but he can claim no greater benefit than would have accrued to him if the wrongful sale had not been made. If, for instance, the price of the stock does not advance again after the sale, but declines still more, it is clear that the customer, instead of being injured by the sale, is really benefited by it.[2]

Accordingly, where it appeared that the customer could have purchased the stock at any time within thirty days after an unauthorized sale by his broker, for a less price than that at which it was sold, it was held that the customer was entitled to recover only nominal damages for such unauthorized sale.[3]

§ 757a. **In some cases it has been held that the pledgor of shares of stock is entitled to a specific performance** of the contract for return of the stock, upon payment or tender of the

[1] Griggs v. Day, 158 N. Y. 1, 52 N.E. Rep. 692, reversing 21 App. Div. 442, 47 N. Y. Supp. 609.

[2] Galigher v. Jones, 129 U. S. 193, 9 S. C. Rep. 335; Wright v. Bank of Metropolis, 110 N. Y. 237, 18 N. E. Rep. 79; Minor v. Beveridge, 141 N. Y. 399, 36 N. E. Rep. 404; North v. Phillips, 89 Pa. St. 250; Gruman v. Smith, 81 N. Y. 25; Colt v. Owens, 15 J. & S. (N. Y.) 430, 13 N. Y. Weekly Dig. 40; affirmed by court of appeals, 15 J. & S. (N. Y.) 439, 90 N. Y. 368; Smith v. Lee, 84 Fed. Rep. 557.

[3] Colt v. Owens, 15 J. & S. (N. Y.) 430, 90 N. Y. 368.

amount of the indebtedness to secure which it was pledged, if it appears that the stock has no market or ascertainable value, and that the pledgor purchased it for investment with a view to anticipated increase in value, and that he can not purchase other shares in the corporation for the reason that no holder will sell them. Where there is no difference in the value of the shares, and the certificate of stock pledged has been conveyed by the pledgee to a *bona fide* purchaser for value, the court may compel the pledgee to convey stock owned by him in lieu of the certificate received from the pledgor.[1]

[1] Krouse v. Woodward, 110 Cal. 638, 42 Pac. Rep. 1084; Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282, as to recovering the identical shares; White v. Schuyler, 1 Abb. Pr. N. S. (N. Y.) 300; Buckmaster v. Consumers' Ice Co., 5 Daly (N. Y.) 313; Cushman v. Thayer Manuf. Jewelry Co., 76 N. Y. 365, 32 Am. Rep. 315; Adams v. Messinger, 147 Mass. 185, 9 Am. St. Rep. 679, 17 N. E. Rep. 491.

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